No. 17-1606	
Title:	Ricky Lee Smith, Petitioner v. Nancy A. Berryhill, Acting Commissioner of Social Security
Docketed:	May 29, 2018
Linked with 17A1121	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(17-5809)
Decision Date:	January 26, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 13 2018	Application (17A1121) to extend the time to file a petition for a writ of certiorari from April 26, 2018 to May 25, 2018, submitted to Justice Kagan. Main Document Proof of Service Other
Apr 19 2018	Application (17A1121) granted by Justice Kagan extending the time to file until May 25, 2018.
May 25 2018	Petition for a writ of certiorari filed. (Response due June 28, 2018) Proof of Service Certificate of Word Count Petition
May 25 2018	Pursuant to Rule 34.6 and Paragraph 9 of the Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, filings in this case should be submitted in paper form only, and should not be submitted through the Court's electronic filing system.
Jun 21 2018	Motion to extend the time to file a response from June 28, 2018 to July 30, 2018, submitted to The Clerk. Main Document
Jun 22 2018	Motion to extend the time to file a response is granted and the time is extended to and including July 30, 2018.
Jul 11 2018	Motion to extend the time to file a response from July 30, 2018 to September 7, 2018, submitted to The Clerk. Main Document
Jul 12 2018	Motion to extend the time to file a response is granted and the time is further extended to and including September 7, 2018.

Sep 04 2018	Motion to extend the time to file a response from September 7, 2018 to September 21, 2018, submitted to The Clerk. **Main Document**
Sep 05 2018	Motion to extend the time to file a response is granted and the time is further extended to and including September 21, 2018.
Sep 21 2018	Brief of respondent Nancy A. Berryhill, Deputy Commissioner for Operations, Social Security Administration filed. **Main Document** **Proof of Service**
Oct 10 2018	DISTRIBUTED for Conference of 10/26/2018.
Oct 29 2018	DISTRIBUTED for Conference of 11/2/2018.
Nov 02 2018	Petition GRANTED.
Nov 02 2018	As Rule 34.6 provides, "If the Court schedules briefing and oral argument in a case that was governed by Federal Rule of Civil Procedure 5.2(c) or Federal Rule of Criminal Procedure 49.1(c), the parties shall submit electronic versions of all prior and subsequent filings with this Court in the case, subject to [applicable] redaction rules." Subsequent party and amicus filings in the case should now be submitted through the Court's electronic filing system, with any necessary redactions.
Nov 05 2018	Deepak Gupta, Esquire, of Washington, D. C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Dec 10 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Dec 11 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including December 19, 2018. The time to file the brief of Court-appointed amicus curiae in support of the judgment below is extended to and including January 22, 2019.
Dec 19 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Dec 19 2018	Brief of petitioner Ricky Lee Smith filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 19 2018	Brief of respondent in support of reversal and remand filed. **Proof of Service** **Main Document**
Dec 26 2018	Brief amicus curiae of National Organization of Social Security Claimants' Representatives filed. **Main Document** **Proof of Service** **Certificate of Word Count**

Jan 04 2019	Motion for an extension of time to file the brief on the merits of Court-appointed amicus curiae in support of the judgment below filed. **Main Document**
Jan 14 2019	Motion for a further extension of time to file the brief on the merits of Court-appointed amicus curiae in support of the judgment below filed. **Main Document**
Jan 15 2019	Motion to further extend the time to file the brief on the merits of Court-appointed amicus curiae in support of the judgment below is granted, and the time is extended to and including February 4, 2019.
Jan 25 2019	SET FOR ARGUMENT on Monday, March 18, 2019
Feb 04 2019	Brief of Court-appointed amicus curiae in support of the judgment below filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 11 2019	Motion for divided argument filed by respondent Nancy A. Berryhill, Deputy Commisioner for Operations, Social Security Administration. **Proof of Service** **Main Document**
Feb 14 2019	CIRCULATED
Feb 21 2019	Record requested from the U.S.C.A. 6th Circuit.
Feb 21 2019	The record from the U.S.C.A is electronic and located on PACER, with the exception of restricted documents that are electronic.
Feb 25 2019	Motion for divided argument filed by the Solicitor General GRANTED, and the time is divided as follows: 15 minutes for petitioner, 15 minutes for the Solicitor General, and 30 minutes for Court-appointed amicus curiae in support of the judgment below.
Feb 28 2019	Reply of petitioner Ricky Lee Smith filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 06 2019	Reply of respondent filed. (Distributed) **Main Document** **Certificate of Word Count**
Mar 18 2019	Argued. For petitioners: Michael B. Kimberly, Washington, D. C. For respondent in support of reversal and remand: Michael R. Huston, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For Court-appointed amicus curiae in support of the judgment below: Deepak Gupta, Washington, D. C.

NAME	ADDRESS	PHONE

Attorneys for Petitioner

Andrew John Pincus Counsel of Record	**Mayer Brown LLP** **1999 K Street, NW** **Washington, DC 20006** apincus@mayerbrown.com	(202) 263-3220

Party name: Ricky Lee Smith

Michael B. Kimberly	**Mayer Brown, LLP** **1999 K Street, NW** **Washington, DC 20006** mkimberly@mayerbrown.com	(202) 263-3127

Party name: Ricky Lee Smith

Attorneys for Respondent

Noel J. Francisco Counsel of Record	Solicitor General **United States Department of Justice** **950 Pennsylvania Avenue, NW** **Washington, DC 20530-0001** SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: Nancy A. Berryhill, Deputy Commisioner for Operations, Social Security Administration

Other

Deepak Gupta Counsel of Record	Gupta Wessler PLLC **1900 L Street, NW** **Suite 312** **Washington, DC 20036** deepak@guptawessler.com	(202) 888-1741

Party name: Court-appointed amicus curiae in support of the judgment below

Carolyn A. Kubitschek Counsel of Record	**Lansner & Kubitschek** **325 Broadway, Suite 203** **New York, NY 10007** ckubitschek@lanskub.com	2123490900

Party name: National Organization of Social Security Claimants' Representatives

No.

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

The Social Security Act provides for judicial review of administrative decisions rejecting benefits claims: "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party," may obtain judicial review of that decision in federal court. 42 U.S.C. § 405(g).

Disability benefit claims are initially heard by an administrative law judge; adverse decisions may be appealed to the Appeals Council. Appeals Council decisions rejecting a claim on the merits are subject to judicial review. But the courts of appeals disagree about whether judicial review is available when the Appeals Council finally rejects a claim on the ground that the claimant's administrative appeal was not timely.

The question presented is whether the Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g).

TABLE OF CONTENTS

Page

Question Presented i
Table of Authorities iv
Opinions Below 1
Jurisdiction 1
Statutory and Regulatory Provisions Involved 1
Statement 3
Reasons for Granting the Petition 8
A. There Is An Acknowledged Conflict Over The Question Presented. 8
1. In the Eleventh Circuit, Appeals Council dismissals are deemed "final decisions" subject to judicial review. 8
2. Other courts of appeals hold that Appeals Council dismissals are not reviewable. 10
3. The conflict is entrenched. 12
B. The Question Presented Has Great Importance. 13
1. Disability assistance is vital for families. 13
2. Judicial review of agency action is criti-cal to ensuring fair action by agencies. 14
C. The Sixth Circuit Erred. 16
Conclusion 21
Appendix A – Court of appeals panel opinion (January 26, 2018) 1a
Appendix B – District court order (May 11, 2018) 16a

Appendix C – District Court order (January 12, 2017)..... 22a

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. *Heckler*,
799 F.2d 131 (4th Cir. 1986) 10

Bacon v. *Sullivan*,
969 F.2d 1517 (3d Cir. 1992) 10

Bagood v. *Commissioner of Soc. Sec. Admin.*,
2017 WL 362686 (D. Ariz. 2017) 11

Bannister v. *Commissioner of Soc. Sec. Admin.*,
2014 WL 2171220 (M.D. La. 2014) 10

Bennett v. *Spear*,
520 U.S. 154 (1997) 18

Bloodsworth v. *Heckler*,
703 F.2d 1233 (11th Cir. 1983) ..... *passim*

Bowen v. *Michigan Acad. of Family Physicians*,
476 U.S. 667 (1986) 4

Brandtner v. *Department of Health & Human Servs.*,
150 F.3d 1306 (10th Cir. 1998) 5, 11

Califano v. *Sanders*,
430 U.S. 99 (1977) ..... *passim*

Counts v. *Commissioner of Soc. Sec.*,
2010 WL 5174498 (M.D. Fla. 2010) 15, 21

Crook v. *Colvin*,
2014 WL 773692 (W.D. Mo. 2014) 10

Cuozzo Speed Techs., LLC v. *Lee*,
136 S. Ct. 2131 (2016) 16

Davis v. *Colvin*,
2013 WL 1174157 (M.D. Fla. 2013) 14

Dietsch v. *Schweiker*,
700 F.2d 865 (2d Cir. 1983) 11

Farrow v. *Astrue*,
2012 WL 4925939 (E.D.N.C. 2012) 9

Harper v. *Bowen*,
813 F.2d 737 (5th Cir. 1987) 10, 12, 19

Lindahl v. *Office of Personnel Mgmt.*,
470 U.S. 768 (1985) 16

Mach Mining, LLC v. *EEOC*
135 S. Ct. 1645 (2015) 4, 16

Matlock v. *Sullivan*,
908 F.2d 492 (9th Cir. 1990) 11

Morris v. *Berryhill*,
2017 WL 600089 (M.D. Ala. 2017) 12

Nicosia v. *Barnhart*,
160 F. App'x 186 (3d Cir. 2005) 10

Pizarro v. *Commissioner of Soc. Sec.*,
2013 WL 847331 (M.D. Fla. 2013) 15

Quarles v. *Colvin*,
2016 WL 4250399 (S.D. Ala. 2016) 12

Ramirez v. *Colvin*,
2016 WL 9711362 (D.N.M. 2016) 11

Rice-McKenzie v. *Colvin*,
2017 WL 2960507 (D. Conn. 2017) 11

Smith v. *Heckler*,
761 F.2d 516 (8th Cir. 1985) 8, 10

Stone v. *Heckler*,
778 F.2d 645 (11th Cir. 1985) 8, 12

Walker v. *Commissioner of Soc. Sec.*,
2013 WL 3833199 (M.D. Fla. 2013) 15

Zinermon v. *Burch*,
494 U.S. 113 (1990) 15

Statutes, Rules and Regulations

20 C.F.R. § 404.968 ..... 4, 6

20 C.F.R. § 416 ..... *passim*

42 U.S.C. § 405 ..... *passim*

Other Authorities

David Fahrenthold, *The Biggest Backlog in the Federal Government*,
Wash. Post (Oct. 18, 2014) 14

Melissa M. Favreault et al., *How Important Is Social Security Disability Insurance to U.S. Workers?*, Urban Inst., 1 (June 2013) 13

Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*,
17 Fla. St. U. L. Rev. 199 (1990) 14

Emily Palmer, *On Her Own, Raising Twin 'Princesses' with Special Needs*,
N.Y. Times (Nov. 22, 2017) 13

U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2017, U.S. Courts (2017) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ricky Lee Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 880 F.3d 813. The orders of the district court (App., *infra*, 16a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. On April 19, Justice Kagan entered an order extending the time for filing a certiorari petition to and including May 25, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 405(g) and (h) provide in relevant part:

> (g) Judicial Review.
>
> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the

> plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.
>
> (h) Finality of Commissioner's decision.
>
> The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

Regulations issued by the Department of Health and Human Services and codified in Part 416 of Title 20 of the Code of Federal Regulations state:

> 416.1468. (a) Time and place to request Appeals Council review. You may request Appeals Council review by filing a written request. You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. You may file your request at one of our offices within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) Extension of time to request review. You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an extension of time must be in writing. It must be filed with the Appeals Council, and it must give the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

416.1471. The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended.

416.1472. The dismissal of a request for Appeals Council review is binding and not subject to further review.

STATEMENT

The courts of appeals have acknowledged a longstanding, entrenched disagreement over an oft-recurring question: whether the Social Security Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g). The Eleventh Circuit has held that such decisions are reviewable, and the Social Security Commission has issued an acquiescence ruling applicable in that circuit only. Several other circuits, including the court below, have expressly rejected the Eleventh Circuit's holding.

Review is warranted. This question arises in scores of cases each year; it is always a threshold, dispositive issue; it goes to the fundamental balance of authority between administrative agency and federal court; and the decision below, which denied judicial review, is almost certainly wrong.

A. Legal Background.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). This Court therefore applies a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

Title II of the Social Security Act expressly provides for judicial review of all "final decision[s]" of the Commissioner of Social Security. 42 U.S.C. § 405(g). Whether a court has jurisdiction to review a particular decision therefore depends on whether it constitutes a "final decision" by the Commissioner.

The procedure for adjudicating Social Security disability benefits claims begins with an initial decision by an administrative law judge (ALJ). If the claimant objects to the ALJ's determination regarding his claim, the claimant may appeal that determination to the Appeals Council. See generally 20 C.F.R. §§ 416.1467 to 416.1482. The deadline for requesting Appeals Council review is 60 days from receipt of notice of the ALJ's decision. *Id.* §§ 404.968, 416.1468. An out-of-time request for review is allowable where the claimant establishes "good cause" for not appealing in a timely manner. *Ibid.*

The regulations provide that "[t]he Appeals Council will dismiss your request for review if you

did not file your request within the stated period of time and the time for filing has not been extended." 20 C.F.R. § 416.1471. They further state that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." *Id.* § 416.1472.

If a request for Appeals Council review is not dismissed, the Council "may deny a party's request for review or it may decide to review a case and make a decision." 20 C.F.R. § 416.1481. "The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised." *Ibid.*

The courts of appeals disagree on whether an Appeals Council dismissal of a request for review on the grounds of untimeliness constitutes a "final decision" under Section 405(g). Compare *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998) ("The dismissal as untimely is not a decision on the merits or a denial of a request for review by the Appeals Council, both of which constitute final decisions and can be reviewed by the federal district court."), with *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983) ("Neither the statute nor the regulations make any distinction in regard to rights of judicial appeal between dismissals and determinations on the merits by the Appeals Council. Both are equally final and both trigger a right to review by the district court.").

B. Factual and Procedural Background.

Petitioner Ricky Lee Smith initially applied in September 1987 for supplemental security income

resulting from disability. App., *infra*, 2a. Smith suffered from a recurrent post-operative tumor on his spine, as well as resultant pain in his back, feet, and left leg, with severe exertional limitations and recurrent urinary infections due to his need to self-catheterize since 1987.

An ALJ issued a decision in Smith's favor in October 1988, and he received benefits until 2004, when he was found to be ineligible because his financial resources exceeded the permissible limit. App., *infra*, 3a.

Smith filed a new application for supplemental security income in August 2012, alleging additional medical conditions as a result of his original disability, including spinal disorders, diverticulitis, hypertension, and depression. App., *infra*, 3a. The claim was denied, and denied again upon reconsideration. *Ibid.*

Smith timely filed a request for a hearing before an administrative law judge. ALJ Robert Bowling conducted a videoconference on February 18, 2014. App., *infra*, 3a. On March 26, 2014, a different ALJ, Don Paris, signed a decision on behalf of ALJ Bowling, denying Smith's claim. *Ibid.*

Smith asserts that he mailed to the Appeals Council on April 24, 2014, a written request for review of ALJ Paris's decision—within the 60-day period for filing an appeal. App., *infra*, 3a; 20 C.F.R. §§ 404.968, 416.1468.

On September 21, 2014, Smith faxed a letter to the Social Security Administration asking about the status of his appeal. App., *infra*, 3a. He attached a copy of his written request to appeal, dated April 24, 2014. *Ibid.* A claims representative responded in a

letter dated October 1, 2014, stating that the Administration had not received Smith's request for an appeal. *Ibid.* The representative then mailed to the Appeals Council a completed form requesting review, along with Smith's written request for review. *Id.* at 4a. The representative informed Smith that his appeal request was filed as of that date, October 1, 2014. *Ibid.*

Smith then mailed to the Appeals Council via first-class mail a copy of his April 24, 2014 appeal—together with a statement from his counsel affirming that the appeal had been mailed on April 24, 2014, within the filing deadline. App., *infra*, 4a & n.1. On November 6, 2015, the Appeals Council dismissed the request for review as untimely, finding no good cause to extend the time for filing an appeal. *Id.* at 4a.

Smith then commenced this action in the United States District Court for the Eastern District of Kentucky, seeking judicial review of the Appeals Council's decision under 42 U.S.C. § 405(g). Smith asserted that the Appeals Council had improperly dismissed his request for review.

The district court dismissed the complaint, holding that it lacked subject matter jurisdiction to hear the claim. App., *infra*, 8a.

The court of appeals affirmed. It held that the Appeals Council's dismissal of Smith's untimely request for review was not a "final decision" subject to judicial review under Section 405(g). App., *infra*, 8a. The court observed that, while "the Eleventh Circuit sees this issue differently," the "majority view is that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of

such requests do not constitute 'final decisions' reviewable by district courts." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

A. There Is An Acknowledged Conflict Over The Question Presented.

The courts of appeals are in clear conflict over the question presented—and both the courts and the federal government have recognized the disagreement.

The Eleventh Circuit held in *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983), that Appeals Council dismissals are subject to judicial review. Other courts have stated that "*Bloodsworth* * * * must be rejected." *Smith* v. *Heckler*, 761 F.2d 516, 519 (8th Cir. 1985). The Eleventh Circuit, in turn, has reaffirmed that *Bloodsworth* "remains binding precedent" notwithstanding the view of other courts of appeals. *Stone* v. *Heckler*, 778 F.2d 645, 648 (11th Cir. 1985).

The Social Security Administration follows different procedures for claimants in the Eleventh Circuit as a result of the conflict—informing them that they are entitled to judicial review of dismissal decisions. Such notices are not provided to claimants in other circuits.

Only this Court can restore uniformity on an issue affecting Americans' ability to obtain judicial review of the denial of a vital government benefit.

1. *In the Eleventh Circuit, Appeals Council dismissals are deemed "final decisions" subject to judicial review.*

In *Bloodsworth*, the Eleventh Circuit determined that an "'administrative decision declining to extend

time and review the merits * * * certainly is 'final'" and "fulfill[s] the statutory requirements of section 405(g)." 703 F.2d at 1236, 1239. The court explained that "the Appeals Council decision not to review *finalizes* the decision made after a hearing by the administrative law judge" denying the benefits claim. *Id.* at 1239.

Disallowing review, the court continued, would leave a claimant "permanently in limbo." *Bloodsworth*, 703 F.2d at 1239. "[T]he claimant would never have a 'final' decision, because the decision of the administrative law judge would not be final until the Appeals Council had reviewed it on the merits. But the claimant would certainly be 'finished' because Appeals Council dismissals are reviewable only by appeal to the federal district court." *Ibid.*

The Eleventh Circuit considered, and rejected, the claim that Appeals Council dismissals are not final under *Califano* v. *Sanders*, 430 U.S. 99 (1977). *Bloodsworth*, 703 F.2d at 1239. In *Sanders*, this Court held that Section 405(g) does not permit courts to review denials of a request by the Appeals Council "to reopen a claim of benefits" previously rejected in a final decision. 430 U.S. at 107.

The Eleventh Circuit held that *Sanders* did not apply because "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. "The first review by the Appeals Council is a normal stage in the administrative review procedure, available as of right to any [dissatisfied] party," but the "reopening of a case is an extraordinary measure, affording the oppor-

tunity of a second excursion through the decision making process." *Id.* at 1237-1238.

The *Bloodsworth* court therefore proceeded to review the Appeals Council's dismissal under the abuse of discretion standard. 703 F.2d at 1239.

2. Other courts of appeals hold that Appeals Council dismissals are not reviewable.

Seven courts of appeals have squarely rejected *Bloodsworth*, holding instead that Appeals Council dismissals on untimeliness grounds are not "final decisions" subject to judicial review.

The **Third Circuit** reached this conclusion in *Bacon* v. *Sullivan*, 969 F.2d 1517, 1520-1521 (3d Cir. 1992). It acknowledged the disagreement with the Eleventh Circuit. *Ibid.* *Bacon* remains controlling in the circuit. See, *e.g.*, *Nicosia* v. *Barnhart*, 160 F. App'x 186, 188 (3d Cir. 2005).

The **Fourth Circuit** in *Adams* v. *Heckler*, 799 F.2d 131, 133 (4th Cir. 1986), "reject[ed] the reasoning of *Bloodsworth*." *Adams* remains controlling in the circuit. See, *e.g.*, *Farrow* v. *Astrue*, 2012 WL 4925939, at *2 (E.D.N.C. 2012).

The **Fifth Circuit** reached the same conclusion in *Harper* v. *Bowen*, 813 F.2d 737, 741 (5th Cir. 1987), stating that it did "not agree with the Eleventh Circuit's decision in *Bloodsworth*." *Harper* remains controlling in the circuit. See, *e.g.*, *Bannister* v. *Commissioner of Soc. Sec. Admin.*, 2014 WL 2171220, at *2 (M.D. La. 2014).

The **Eighth Circuit** in *Smith* v. *Heckler*, 761 F.2d 516, 519 (8th Cir. 1985), held that "*Bloodsworth* * * * must be rejected." *Smith* remains controlling in

the circuit. See, *e.g.*, *Crook* v. *Colvin*, 2014 WL 773692, at *1-2 (W.D. Mo. 2014).

The **Ninth Circuit** in *Matlock* v. *Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990), "decline[d] to follow" [*Bloodsworth*]." *Matlock* remains controlling in the circuit. See, *e.g.*, *Bagood* v. *Commissioner of Soc. Sec. Admin.*, 2017 WL 362686, at *2 (D. Ariz. 2017).

The **Tenth Circuit** in *Brandtner* v. *Department of Health & Human Services*, 150 F.3d 1306, 1307 n.2 (10th Cir. 1998), stated that it "disagree[d] with the Eleventh Circuit's holding in *Bloodsworth*," and "specifically decline[d] to adopt that court's reasoning on this issue." *Brandtner* remains controlling in the circuit. See, *e.g.*, *Ramirez* v. *Colvin*, 2016 WL 9711362, at *2 (D.N.M. 2016), report and recommendation adopted, 2017 WL 4232530 (D.N.M. 2017).

In the opinion below, the **Sixth Circuit** held that dismissals were not final—recognizing that "the Eleventh Circuit sees this issue differently." App., *infra*, 7a.

One additional court of appeals, the Second Circuit, adopted the majority rule prior to *Bloodsworth*, in *Dietsch* v. *Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983). *Dietsch* remains controlling today. See, *e.g.*, *Rice-McKenzie* v. *Colvin*, 2017 WL 2960507, at *1-2 (D. Conn. 2017).

These courts of appeals largely rest their decisions on this Court's ruling in *Sanders*. See, *e.g.*, *Matlock*, 908 F.2d at 494 (noting that while "the Eleventh Circuit distinguished refusals to hear untimely petitions from refusals to reopen benefits claims," it disagreed that "a meaningful distinction [exists] between these two refusals"). Pointing to this Court's statement that Congress wished to "forestall

repetitive or belated litigation of stale eligibility claims" (*Sanders*, 430 U.S. at 108), they hold that review of Appeals Council dismissals would implicate "a similar issue" because it would also permit belated litigation. *Harper*, 813 F.2d at 741-742.

That analysis is directly contrary to the Eleventh Circuit's interpretation of *Sanders*.

3. The conflict is entrenched.

This clear conflict will not dissipate in the absence of this Court's intervention. Despite acknowledging the Eleventh Circuit's contrary view, no courts have joined it. And the Eleventh Circuit has steadfastly adhered to *Bloodsworth*. Indeed, even when it decided the case, it acknowledged it "was "aware of the contrary conclusion in [the Eighth Circuit]." *Bloodsworth*, 703 F.2d at 1239. The Eleventh Circuit has since stated that, "[a]lthough *Bloodsworth* has been explicitly or implicitly rejected by other circuit courts of appeal, it remains binding precedent in this circuit." *Stone*, 778 F.2d at 648.

Courts in the Eleventh Circuit regularly apply *Bloodsworth*. See, *e.g.*, *Morris* v. *Berryhill*, 2017 WL 600089, at *3 (M.D. Ala. 2017); *Quarles* v. *Colvin*, 2016 WL 4250399, at *3 (S.D. Ala. 2016) ("As the Commissioner concedes, it has long been the law of this Circuit that the Appeals Council's dismissal of a request to review as untimely is a 'final' decision subject to judicial review.").

Even more importantly, the Social Security Administration itself has recognized that the conflict will not dissipate by acquiescing to the Eleventh Circuit's decision. Acquiescence Ruling 99-4(11), 1999 WL 1137369 (S.S.A. Oct. 26, 1999). It therefore informs residents of "Alabama, Florida, or Georgia"—

and only residents of those States—that they may "request judicial review" "at the time of the Appeals Council dismissal" on untimeliness grounds. *Id.* at *2.

Only this Court can restore uniformity on the question presented.

B. The Question Presented Has Great Importance.

Judicial review of administrative agency decisions provides critically important protections against unjustified administrative agency decisions. That protection is especially important in the context of disability benefit decisions given the importance of these benefits to the lives of the statute's beneficiaries, the large number of Americans affected, and the well-documented flaws in Appeals Council decision-making.

1. Disability assistance is vital for families.

The Social Security Administration's disability program is critically important to American families. Disability insurance "provides a crucial lifeline for some of the nation's most vulnerable citizens." Melissa M. Favreault et al., *How Important Is Social Security Disability Insurance to U.S. Workers?*, Urban Inst., 1 (June 2013), perma.cc/N7PB-Z4MC. Disability insurance payments "account for the majority of family income for nearly half" of recipients and "more than two-thirds" of unmarried recipients. *Ibid.* Even for those who receive these benefits, family incomes "fall well below the average for nondisabled Americans," and 31 percent of disability insurance recipients live in poverty. *Id.* at 1, 7.

The Batista family provides an example. See Emily Palmer, *On Her Own, Raising Twin 'Princess-*

es' with Special Needs, N.Y. Times (Nov. 22, 2017), goo.gl/e9pZky. Ingrid Batista is a single mother raising twin four-year-old girls who both have Down syndrome and are on the autism spectrum. *Ibid.* The girls are unable to hear or speak, requiring Ms. Batista as a full-time caregiver. *Ibid.* Ms. Batista works when a relative can babysit, but the $1,322 a month in Social Security disability support received for her daughters provides more than half of the family's income. *Ibid.*

2. Judicial review of agency action is critical to ensuring fair action by agencies.

Supervision of administrative agencies by the courts is necessary to ensure that agency action is lawful and fair. This is especially important when an agency is overworked. In 1990, for instance, Appeals Council members could only spend ten to fifteen minutes reviewing an average case. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 257 (1990). Decisions were rushed and claimants complained that opinions were "conclusory, incomplete, and not fully comprehensible." *Id.* at 257 n.308. The Appeals Council was said to be "swallowed whole by its docket" then. *Id.* at 267.

In 2014, more than 150,000 people waited for Appeals Council decisions, on average for 374 days. David Fahrenthold, *The Biggest Backlog in the Federal Government*, Wash. Post (Oct. 18, 2014), perma.cc/NQ7S-F48F.

Judicial review by courts in the Eleventh Circuit has provided a vital check against the Appeals Coun-

cil's errors. Courts regularly find that the Appeals Council was unjustified in dismissing a claim. See, *e.g.*, *Davis* v. *Colvin*, 2013 WL 1174157, at *6 (M.D. Fla. 2013) (holding that the Appeals Council's dismissal on grounds of untimeliness was unfounded); *Counts* v. *Commissioner of Soc. Sec.*, 2010 WL 5174498, at *10 (M.D. Fla. 2010) (holding that a dismissal was "not based on substantial evidence"); *Walker* v. *Commissioner of Soc. Sec.*, 2013 WL 3833199, at *7-8 (M.D. Fla. 2013) (reversing the decision of the Appeals Council when it incorrectly failed to consider new evidence); *Pizarro* v. *Commissioner of Soc. Sec.*, 2013 WL 847331, at *4 (M.D. Fla. 2013) (upholding a magistrate judge's decision that a dismissal was not based on substantial evidence).

In contrast, under the Sixth Circuit's interpretation, review is limited to procedural due process claims. App., *infra*, 8a. That leaves little opportunity for viable challenges. A procedural due process inquiry "examine[s] the procedural safeguards built into the statutory or administrative procedure [] effecting [a] deprivation," but does not review the "ultimate merits" of the decision. *Zinermon* v. *Burch*, 494 U.S. 113, 126, 139 (1990).

The Eleventh Circuit's experience shows that its rule does not overwhelm the courts. Indeed, the district courts of the Eleventh Circuit actually see a lower percentage of Social Security cases than other courts in other circuits. In the Eleventh Circuit, Social Security cases make up 6.7% of all civil cases in district court, compared to 7.9% in district courts in the other circuits. *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2017*, U.S. Courts (2017), perma.cc/LV2D-RLB7.

If the opinion below stands uncorrected, district courts in the Sixth Circuit will refuse to hear statutory challenges to Appeals Council dismissals. But, as the rulings by courts within the Eleventh Circuit indicate, some of those dismissals were almost certainly due to agency error. Judicial review may only affect the outcome of a minority of disability cases, but the agency nevertheless should not have the unilateral authority to sweep cases under the rug—especially when the statutory text precludes that result, as we next discuss.

C. The Sixth Circuit Erred.

An acknowledged division of authority on an issue of great practical importance is reason enough to grant the petition. Certiorari is all the more necessary here because the Sixth Circuit's decision below is wrong.

This Court has long recognized that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). While the "presumption is rebuttable," the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review." *Ibid.*

Indeed, judicial review is available even where a statute "plausibly can be read as imposing an absolute bar to judicial review." *Lindahl* v. *Office of Personnel Mgmt.*, 470 U.S. 768, 779 (1985). "[I]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part) (summarizing the case law).

Judicial review "enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not 'undercut,' Congress's objectives." *Id.* at 2151.

The availability of judicial review here turns on Section 405(g), which provides in relevant part that "[a]ny individual, *after any final decision of the Commissioner of Social Security made after a hearing* to which he was a party, * * * may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." 42 U.S.C. § 405(g). This case therefore depends on whether the Appeals Council's dismissal of Smith's request for review constitutes a "final decision" by the Commissioner within the meaning of Section 405(g).[1]

The statutory text makes clear that judicial review is available. Petitioner's request for review was denied on grounds of untimeliness by the Appeals Council, and that decision precluded any further administrative review of his claims—administrative review of his claim was at an end.

For that reason, an Appeals Council dismissal of a claim on grounds of untimeliness is indisputably a "final decision." A contrary interpretation is inconsistent with the word's plain meaning.

There is no doubt that the Appeals Council decision is "binding" on the claimant, and that claimant

---

[1] There is no question that the "after a hearing" requirement is satisfied here because the ALJ conducted a hearing on Smith's claim. See p. 6, *supra*.

has no further steps in the administrative review process. See generally 20 C.F.R. §§ 416.1404 to 416.1482. In other words, the Commissioner simply has not met the "heavy burden" of demonstrating that the statute precludes judicial review in these circumstances.

The Sixth Circuit ignored the plain language of the statute and held that an Appeals Council dismissal is not a "final decision" because the Council does not consider the appeal of the ALJ's decision on the merits. App., *infra*, 7a-8a. But that distinction is entirely irrelevant: "Neither the statute nor the regulations make any distinction" between decisions on the merits and other dispositions. *Bloodsworth*, 703 F.2d at 1237. In both situations, "the Appeals Council decision not to review *finalizes* the decision made after a hearing by the administrative law judge, fulfilling the statutory requirements of section 405(g)." *Id.* at 1239.

The Sixth Circuit's approach also conflicts with this Court's definition of finality under the Administrative Procedure Act. The Court has long held that an agency action is "final" when it marks the "'consummation' of the agency's decision making process," and under which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997).

The Appeals Council's dismissal of Smith's claim clearly falls within that definition. It is not a "tentative recommendation," but rather a decision with "direct and appreciable legal consequences." *Bennett*, 520 U.S. at 154. As the Fifth Circuit has conceded, a determination that an Appeals Council dismissal is not a "final decision" would "leave a claimant permanently in limbo," because the decision of the adminis-

trative law judge would *never* become "final" for the purposes of obtaining judicial review. *Harper*, 813 F.2d at 742.[2]

Unable to find an "unambiguous" preclusion of judicial review in the statute, the Sixth Circuit rested its holding on the Court's decision in *Califano* v. *Sanders*. App., *infra*, 5a-7a. But *Sanders* is wholly inapposite.

The claimant there had filed a claim for disability benefits and proceeded through all of the steps of administrative review. *Sanders*, 430 U.S. at 102-104. The claimant then did not seek judicial review of the Secretary's final decision. *Id.* at 102. Almost seven *years* later, the claimant filed a second claim alleging the same bases for eligibility, and an ALJ denied reopening of the case and dismissed the claim. *Id.* at 102-103.

This Court held that it lacked jurisdiction to consider a request "to reopen a claim of benefits" after the claim had been previously rejected. *Sanders*, 430 U.S. at 107-108. It held that the Social Security Act "clearly limits judicial review to a particular type of

---

[2] The agency's regulation stating that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review" (20 C.F.R. § 416.1472) provides no basis for ignoring the plain statutory text. And even if the text were less clear, the canon of statutory construction establishing a presumption in favor of judicial review provides another basis for upholding the construction supported by the plain text. There simply is no ambiguity permitting deference to an agency interpretation. *Epic Sys., Inc.* v. *Lewis*, No. 16-285, slip op. 21 (May 21, 2018) ("deference is not due" under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), unless a court "is left with an unresolved ambiguity" after applying the relevant canons of statutory construction).

agency action, a 'final decision of the Secretary made after a hearing.' But a petition to reopen a prior final decision may be denied without a hearing." *Id.* at 108.

The denial of review here does not involve a second bite at the apple seven years after being afforded—and not utilizing—the opportunity to obtain judicial review. As the Eleventh Circuit has explained, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. Reopening offers the claimant a "bonus opportunity" for obtaining administrative reconsideration of a final decision, but the Appeals Council determination to dismiss a case as untimely is a "final decision" on one's claim, from which one can take an appeal to the district court. *Id.* at 1238.

The Sixth Circuit also cited *Sanders*'s reference to the frustration of the statute's 60-day limitation on judicial review of the Commissioner's decision. App., *infra*, 6a. But permitting review of Appeals Council dismissals for untimeliness retains the 60-day period for seeking judicial review, but acknowledges that the "final decision" occurred when the Appeals Council dismissed the claim.

Indeed, this Court explained that "Congress' determination [] to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall *repetitive* or belated litigation of stale eligibility claims." *Sanders*, 430 U.S. at 108 (emphasis added). Permitting judicial review of Smith's claim does not enable repetitive litigation: this is his first opportunity to obtain judicial review of the agency's decision.

Petitioner has a strong argument that his appeal was timely, or alternatively that he should have been granted an extension.

Smith and his lawyer stated that Smith filed a timely appeal. Informed that his appeal had not been received, Smith provided a copy of his April 24, 2014 appeal, along with a statement from his counsel that affirmed that the appeal was mailed to the Appeals Council. App., *infra*, 4a & n.1.

These facts present precisely the sort of agency error that courts within the Eleventh Circuit review and correct in order to protect deserving claimants. See, *e.g.*, *Counts*, 2010 WL 5174498, at *1 (holding that the Appeals Council's decision to dismiss on the ground of untimeliness was not based on substantial evidence because the Administration failed to provide any evidence indicating that the written notice of the reconsideration determination was actually mailed to the claimant).

Just as the agency may sometimes fail to send notice to a claimant of an ALJ's decision, so too may it fail to record an appeal that it in fact receives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

MAY 2018

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT I.O.P. 32.1(B)

File Name: 18a0017p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICKY LEE SMITH,

Plaintiff-Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 17-5809

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 5:16-cv-00003—David L. Bunning, District Judge.

Decided and Filed: January 26, 2018

Before: MERRITT, GRIFFIN, and DONALD, Circuit Judges.

COUNSEL

ON BRIEF: Wolodymyr Cybriwsky, Prestonburg, Kentucky, for Appellant. Laura H. Holland, SOCIAL SECURITY ADMINISTRATION, Denver, Colorado, for Appellee.

OPINION

MERRITT, Circuit Judge. Ricky Lee Smith filed an application for supplemental security income resulting from disability. A hearing was conducted before an administrative law judge ("ALJ"). The ALJ issued an unfavorable decision, finding that Smith was not disabled under the Social Security Act. The notice of decision stated that Smith had sixty days to file a written appeal with the Appeals Council if he disagreed with the ALJ's decision. Smith's attorney claimed he timely mailed a request for review to the Appeals Council, but was unable to provide any independent evidence of this. The Social Security Administration did not receive the request until approximately four months after the time for appeal had expired. Finding no good cause for the untimeliness, the Appeals Council dismissed the appeal. Smith subsequently filed a civil complaint seeking review of the Appeals Council's dismissal of his untimely request for review. The district court dismissed his complaint for lack of jurisdiction and because Smith made no colorable constitutional claims.

On appeal to this court, Smith alleges that he suffered due process violations because: (1) his request for Appeals Council review was timely submitted but dismissed as untimely, (2) a different ALJ signed his hearing decision than the one that presided over his hearing, and (3) the ALJ referenced Smith's 1988 favorable supplemental security income decision in his unfavorable decision denying income for new medical conditions, but failed to attach a copy of it as an exhibit. We hold that an Appeals Council decision to refrain from considering an un-

timely petition for review is not a "final decision" subject to judicial review in federal court. Further, for the reasons explained below, each of Smith's due process arguments fail. Therefore, we **AFFIRM** the order of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 18, 1987, Smith filed an application for supplemental security income resulting from disability. On October 13, 1988, an ALJ issued a favorable decision. Smith received benefits until 2004, when he was found to be over the resource limit.

Smith filed another application for supplemental security income on August 7, 2012, alleging additional medical conditions as a result of his original disability. The claim was initially denied, and denied again upon reconsideration.

Smith timely filed a request for a hearing before an ALJ. A hearing was conducted by videoconference before ALJ Robert Bowling on February 18, 2014. On March 26, 2014, ALJ Don Paris signed a decision on behalf of ALJ Bowling denying Smith's claim. Pursuant to the governing regulations, Smith had sixty days to appeal the decision to the Appeals Council. He claims that he mailed a written request for review to the Appeals Council on April 24, 2014.[1] On September 21, 2014, Smith faxed a correspondence to the Society Security Administration, inquiring as to the status of his appeal, and attaching a copy of his written request, which was dated April 24, 2014. A claims representative informed Smith in a letter dated October 1, 2014, that his request had not been placed in the "electronic folder," and that if the Appeals Council had received the request, it would have

mailed a receipt. The representative mailed a completed request for review form to the Appeals Council along with Smith's written request for review. The representative informed Smith that his appeals request was filed as of that day, October 1, 2014.[1] On November 6, 2015, the Appeals Council dismissed the request for review as untimely, having found no good cause to extend the time for filing because Smith's attorney could not provide evidence indicating that it was sent within the appropriate time.

Smith filed a civil action seeking review of the Appeals Council's dismissal. Smith alleged in his complaint that the Appeals Council improperly dismissed his request for review and that he suffered due process violations. The Commissioner moved to dismiss the complaint for lack of subject matter jurisdiction, and alternatively, for failure to state a claim. The district court determined that there was no judicial review available because the Appeals Council's dismissal of Smith's request for appeal as untimely did not constitute a final decision and Smith made no colorable constitutional claims. It subsequently granted the Commissioner's motion. Smith filed a motion for relief from the court's order, which the court denied. He now appeals.

---

[1] Smith's attorney asserts that he timely mailed a written request for review using first-class mail in his court filings and in his correspondence with the Social Security Administration. However, other than his own testimony, he is unable to provide any proof that he mailed the request on April 24, 2014.

II. ANALYSIS

A. Jurisdiction

The threshold question is whether the decision of the Appeals Council not to consider Smith's untimely request for review was a "final decision" subject to judicial review under 42 U.S.C. § 405(g). We hold that it was not.

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *See Willis v. Sullivan*, 931 F.2d 390, 395 (6th Cir. 1991). The Social Security Act limits judicial review to a "final decision" of the Commissioner made after a hearing. 42 U.S.C. § 405(g). When a claimant is not satisfied with an ALJ's hearing decision, the claimant may request review from the Appeals Council within sixty days of receipt of the decision. 20 C.F.R. §§ 416.1467-416.1468. The Appeals Council may "deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case" to an ALJ. *Id.* § 416.1467. If the claimant demonstrates good cause for missing the filing deadline, the regulations permit the Appeals Council to extend the time for filing an otherwise untimely request for review. *Id.* § 416.1468(b). If the Appeals Council dismisses the request for review as untimely, the dismissal is binding and not subject to further review. *Id.* §§ 416.1471-416.1472. Judicial review is available only after administrative exhaustion. *Id.* § 416.1400(a)(5).

In *Califano v. Sanders*, 430 U.S. 99, 108 (1977), the Supreme Court held that judicial review of a denial of a petition to reopen a prior final decision is unavailable in the absence of a colorable constitutional claim. The Court reasoned that, "an interpre-

tation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [§] 205(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Id.*

We have not directly addressed the issue at hand in a published opinion, but we have addressed similar issues on which we can rely. In *Hilmes v. Secretary of Health & Human Services*, 983 F.2d 67, 68 (6th Cir. 1993), the claimant had sixty days to request a hearing before an ALJ after receiving a notice of award from the Social Security Administration. The claimant sought an extension of the request deadline, but then failed to request a hearing until after the extension had expired. *Id.* The ALJ subsequently dismissed the request for a hearing as untimely, and the Appeals Council declined to review the matter, although it noted that there had been no good cause for missing the extended deadline. *Id.* In affirming the district court's dismissal of the plaintiff's petition, we followed the *Sanders* rationale and held that the dismissal of a hearing request as untimely was unreviewable. *Id.* at 69-70. In subsequent unpublished cases, we have applied the *Sanders* and *Hilmes* rules to hold that an order from the Appeals Council dismissing a plaintiff's appeal as untimely is not a "final decision" as defined by the Social Security Act and regulations. *See Coleman v. Comm'r of Soc. Sec.*, No. 96-1395, 1997 WL 539674, at *2 (6th Cir. Aug. 29, 1997) (per curiam) (unpublished table decision); *Young v. Comm'r of Soc. Sec.*, No. 95-2357, 1996 WL 343527, at *1 (6th Cir. June 20, 1996) (unpublished table decision).

Turning to our sister circuits, the majority view is that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute "final decisions" reviewable by district courts. *See, e.g.*, *Brandtner v. Dep't of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon v. Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock v. Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990) ("[P]ermitting claimants to obtain judicial review of denials of their requests for extensions of time would frustrate Congress' intent to forestall belated litigation of stale claims."); *Harper ex rel. Harper v. Bowen*, 813 F.2d 737, 743 (5th Cir. 1987) (holding that the Appeals Council's refusal to grant an extension and consider an untimely request for review is not, under *Sanders* and the Secretary's requirements for exhaustion, a "final decision"); *Adams v. Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Dietsch v. Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983). Only the Eleventh Circuit sees this issue differently. *See Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983).

The Eighth Circuit expressed compelling reasoning for determining that the dismissal of an appeal for failure to timely file is not a final decision:

> The Appeals Council may dismiss a request for review if it is not filed within the stated time. 20 C.F.R. § 404.971 (1984). Such dismissal is binding and not subject to further review. *Id.* 404.972. Such action does not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review. *See id.* §404.981. As we stated in *Sheehan*, "If the claimant may

> obtain review in this situation [late filing of an appeal] the Secretary's orderly procedures for processing disability claims mean little or nothing. If claimant may avoid the timely exhaustion of remedies requirement, any claimant could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision."

Smith v. Heckler, 761 F.2d 516, 518 (8th Cir. 1985) (quoting *Sheehan v. Sec'y of Health, Educ. & Welfare*, 593 F.2d 323, 326-27 (8th Cir. 1979)) (brackets in original). Similarly, we conclude that Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court. Thus, the district court properly concluded it lacked jurisdiction under 42 U.S.C. § 405(g) unless Smith presented a colorable constitutional claim.

B. Due Process

The Supreme Court recognized that when a constitutional challenge is raised to an otherwise unappealable order, "access to the courts is essential to the decision of such questions." *Sanders*, 430 U.S. at 109. This court has interpreted this to mean that a reviewing court must determine whether the plaintiff has established a "colorable constitutional claim." *Cottrell v. Sullivan*, 987 F.2d 342, 345 (6th Cir. 1992). Absent this claim, a federal court has no jurisdiction to review the Appeals Council's decision. *See id.* The use of constitutional language to dress up a claim "does not convert the argument into a colorable constitutional challenge." *Ingram v. Sec'y of Health & Human Servs.*, 830 F.2d 67, 67 (6th Cir. 1987).

Smith claims that his due process rights were violated because: (1) the Appeals Council denied his request for review as untimely after he allegedly timely mailed the request, (2) a different ALJ signed the unfavorable decision than the ALJ that held his hearing, and (3) his 1988 decision was referenced by the ALJ but not attached to the decision as an exhibit. Smith argues that the district court's dismissal of his appeal is not supported by substantial evidence, actual evidence, the Commissioner's own regulations and policies, or judicial rulings. We address each argument in turn.

1. **Request For Review**

Smith does not argue that he lacked notice of the filing requirements. He instead argues that he did, in fact, timely file his notice of appeal. The district court determined that aside from his attorney's own testimony, Smith was not able to provide any proof that he mailed his written request on April 24, 2014. The court concluded that "[a]bsent independent evidence, such as a postmark or dated receipt, this Court cannot reverse the Appeals Council's determination that the written request for appeal was untimely." *Smith v. Comm'r*, No. 5:16-cv-00003-DLB (E.D. Ky. Jan. 12, 2017). Smith claims on appeal that this finding is contrary to the Commissioner's own regulations, specifically 20 C.F.R. § 404.630,[2] which he asserts "state[s] that the Commissioner is to use the date of the written statement as to be considered the date of filing." Further, he argues that the Commissioner's Hearings, Appeals, and Litigation Law

[2] Smith also claims that 20 C.F.R. § 404.633 supports his argument. However, § 404.633 has to do with misinformation being provided by an agency employee, which is not applicable here.

Manual, referred to as "HALLEX," "accepts the date of the written request as being the date filed, even if the postmark is unreadable or absent."

In *McKentry v. Secretary of Health & Human Services*, 655 F.2d 721, 722 (6th Cir. 1981), the disability claimant's application was denied without a hearing on the merits due to a determination that she failed to request a hearing and reconsideration of the initial denial of her claim within sixty days. The claimant's file contained a dated copy of a "Notice of Reconsideration," which advised that McKentry would need to request a hearing not later than sixty days after receiving the notice, but no evidence that it was actually mailed to her. *Id.* at 723. The claimant and her attorney filed sworn statements that they never received a copy of a notice of redetermination from the Social Security Administration. *Id.* at 722. The ALJ rejected these affidavits and dismissed the claimant's request for a hearing. *Id.* The Appeals Council agreed with the ALJ. *Id.* We reversed and remanded for a hearing on the merits after finding no evidence that the notice was ever mailed to the claimant. *Id.* at 724. We concluded that "[t]he presence of a piece of paper in the Department's file is not necessarily proof of mailing." *Id.*

The same reasoning applies here. Just as a dated piece of paper in the Department's file was not proof of mailing in *McKentry*, in this case, Smith's dated request for appeal and his attorney's testimony that he timely mailed the request is not proof that the request was actually mailed. Further, the Social Security Administration has no record of ever timely receiving the request and Smith was unable to provide a postmark or dated receipt. Taking into account this lack of independent evidence, there is no presump-

tion of receipt. *See Hobt v. Comm'r of Soc. Sec.*, 175 F. App'x 709, 710 (6th Cir. 2006) ("As this Court explained in *McKentry*, a presumption of receipt is inappropriate where there is no evidence that the notice was ever mailed."); *Crook v. Comm'r*, 173 F. App'x 653, 657 (10th Cir. 2006) ("Self-serving declarations of mailing, without more, are insufficient to invoke the presumption of delivery.") (internal quotations, brackets, and citations omitted); *cf. Carroll v. Comm'r*, 71 F.3d 1228, 1229 (6th Cir. 1995) (holding that the common law mailbox rule has no application where the IRS is involved and that "a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril"). Even if such a presumption were appropriate, however, it was effectively rebutted by the Administration's statement that it did not receive the request before October 1, 2014—approximately four months late. Further Smith, unlike the claimant in *McKentry*, had a hearing before an ALJ. The district court properly found that Smith did not suffer any due process violations.

Smith also relies on 20 C.F.R. § 404.630. That provision states that "[i]f a written statement, such as a letter, indicating your intent to claim benefits... is filed with us under the rules stated in § 404.614, we will use the filing date of the written statement as the filing date of the application" if certain additional requirements are met. However, § 404.614(a) states that "[e]xcept as otherwise provided in paragraph (b) of this section. . . a written statement, request, or notice is filed on the day it is received." Paragraph (b) goes on to say that the Social Security Administration will also accept as the date of filing the date a written request is mailed to it, if using the date of receipt "would result in a loss or lessening of

rights." In such a case, the date on the postmark will be used as the date of mailing. § 404.614(b)(2). If the postmark is unreadable or absent, the Administration will consider other evidence of when the claimant mailed the request. *Id.*

Smith's reliance on § 404.630 is misplaced. Smith's request was not considered filed until October 1, 2014, the date it was received by the Administration. Not only was the postmark absent, but there is no evidence that his request for appeal was ever mailed to the Administration during the appeals period because the agency never received anything from him. Other than his attorney's assertion that he timely mailed the request, Smith was unable to provide any "other evidence" to the Administration or the district court.

Smith also relies on the HALLEX.[3] The relevant provision, I-2-0-40, states that ordinarily a request for a hearing is considered filed as of the date it is received by the Social Security Administration office. *Request for Hearing Filing Requirements*, HALLEX (May 1, 2017), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-0-40.html. However, the agency will also accept as the date of filing a postmark date on the envelope in which the request was mailed, if using the date of receipt would result in a loss of the claimant's rights. *Id.* If the postmark is unreadable or absent, the Administration considers the request timely mailed if it receives it by the seventieth day after the date on the notice of the determination or decision

---

[3] Smith cites HALLEX provision I-2-505B in his brief, which does not exist. We can assume that he is referring to I-2-0-40 instead, which covers the filing requirements for requests for hearings.

being appealed. *Id.* It will also consider other evidence of when the claimant mailed the request. *Id.*

This is similar to our analysis above. This argument also fails to persuade us because Smith's request for appeal was not received by the seventieth day after the date on the notice of the decision being appealed. It was received four months after the time for appeal had expired. Additionally, none of the cases that Smith cites provide any support for his contentions.

2. Signature

Smith next argues that, because ALJ Paris signed the decision on behalf of ALJ Bowling, the presiding ALJ , this violated the procedures set forth in the HALLEX, denied him due process, and constituted fraud. This argument lacks merit. The relevant HALLEX provision, I-2-8-40, explains that when an ALJ conducts a hearing but becomes unavailable to sign the decision, the Hearing Office Chief ALJ may sign the decision on behalf of the presiding ALJ, if the presiding ALJ has approved the final draft decision. *Administrative Law Judge Conducts Hearing but Is Unavailable to Issue Decision*, HALLEX (Mar. 10, 2016), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-8-40.html. Therefore, ALJ Paris, as the Hearing Office Chief ALJ, had the authority to sign the hearing decision if ALJ Bowling, the presiding ALJ , was unavailable. The record supports the district court's determination that the Commissioner complied with the HALLEX requirements because the signature on the ALJ's decision plainly states that ALJ Paris was signing for ALJ Bowling. The actions were appropriate under the HALLEX and Smith did not suffer due process violations. *See Creech v. Comm'r of Soc. Sec.*, 581 F. App'x 519, 521 (6th Cir.

2014) (reaching the same conclusion when confronted with the same argument by Smith's attorney). Furthermore, Smith has not shown any prejudice that he suffered as a result of ALJ Paris signing the decision on behalf of ALJ Bowling. *See id.*; *Lawrence v. Comm'r of Soc. Sec.*, 591 F. App'x 470, 471 (6th Cir. 2015) (per curiam) (finding no procedural violations and no prejudice when this argument was again raised by Smith's attorney).

3. Exhibit

Finally, Smith argues that his due process rights were violated when his 1988 decision was referenced by the ALJ but not included as an exhibit in the decision. He did not raise this argument with the district court, and therefore it is forfeited. *See Harper v. Sec'y of Health & Human Servs.*, 978 F.2d 260, 265 (6th Cir. 1992) (refusing to consider an issue not first raised before the Secretary); *cf. Millmine v. Sec'y of Health & Human Servs.*, No. 94-1826, 1995 WL 641300, at *2 (6th Cir. Oct. 31, 1995) (per curiam) (unpublished table decision) (finding that plaintiff's failure to object to an ALJ's possible bias during the administrative process constitutes a waiver of plaintiff's objection). However, even if Smith's factual allegations are true, he has not explained why they would amount to a due process violation, and similar arguments have been rejected as attempts to "dress up" claims as constitutional issues. *E.g.*, *Glazer v. Comm'r of Soc. Sec.*, 92 F. App'x 312, 315 (2004) (finding meritless the claimant's argument that the lack of an administrative record of her prior application had denied her due process); *Gosnell v. Sec'y of Health & Human Servs.*, 703 F.2d 216, 218 (6th Cir. 1983) (holding that due process does not require "the Secretary to retain records perpetually").

III. CONCLUSION

In sum, we find that the district court lacked jurisdiction to review the Appeals Council's dismissal of the untimely request for review and that Smith fails to make any colorable constitutional claims. We **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

RICKY LEE SMITH

PLAINTIFF

vs.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security

DEFENDANT

ORDER

CIVIL ACTION NO. 16-3-DLB

*** *** *** *** *** ***

I. Introduction

This matter is before the Court upon Plaintiff Ricky Lee Smith's Motion for Relief under Rule 59(e). (Doc. # 15). Plaintiff seeks relief from this Court's January 12, 2017 Order dismissing his complaint. (Doc. # 13). For the reasons provided below, Plaintiff's Motion will be **denied.**

II. Factual and Procedural Background

Plaintiff filed an application for benefits under Title XVI of the Social Security Act. On February 18, 2014, Administrative Law Judge ("ALJ") Robert Bowling conducted a hearing on Plaintiff's claim. (Doc. # 9 at 1). On March 26, 2014, ALJ Don Paris issued a decision on behalf of ALJ Bowling denying Plaintiff's claim. (*Id.* at Ex. 1). Plaintiff submitted an appeal to the Appeals Council, and on November 6, 2015, the Appeals Council dismissed Plaintiff's request for review as untimely. (*Id.* at Ex. 7). On Janu-

ary 5, 2016, Plaintiff filed a complaint in this Court seeking review of the Appeals Council's dismissal of his request for review. (Doc. # 1).

In his Complaint, Plaintiff alleged that the Appeals Council improperly dismissed his request for review, and that he suffered due process violations because the ALJ who signed his hearing decision was not the same ALJ who conducted the hearing. *Id.* Defendant moved to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim, because the dismissal of a request for Appeals Council review is binding and not subject to further review. (Doc. # 8 at ¶ 4). This Court granted Defendant's Motion. (Doc. # 13).

On February 12, 2017, Plaintiff filed a motion for relief from the Court's Order pursuant to Rule 59(e). (Doc. # 15). Defendant having filed an Objection to Plaintiff's Motion (Doc. # 17), and Plaintiff having filed a Reply to Defendant's Objection (Doc. # 18), this matter is now ripe for the Court's review.

III. Analysis

A. Standard of Review

Federal Rule of Civil Procedure 59(e) permits parties to file a motion to alter or amend a judgment no later than twenty-eight days after the entry of the judgment. "[A] court may alter the judgment based on: '(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.'" *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010). Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*,

128 S. Ct. 2605, 2617 n.5 (2008) (internal citations omitted). The decision to grant or deny such a motion is "within the informed discretion of the district court, reversible only for abuse." *Betts v. Costco Wholesale Corp.*, 558 F.3d 461, 467 (6th Cir. 2009) (internal quotations omitted).

Here, Plaintiff claims that the Court should alter its judgment based on errors of law. Specifically, Plaintiff asserts that the Court should have considered his tendered sur-reply, that his request for Appeals Council review was timely, and that the ALJ who conducted the hearing should have signed the hearing decision. (Doc. # 15). The Court will consider each of Plaintiff's arguments in turn.

B. Plaintiff's tendered sur-reply

In its prior Order, the Court noted that Plaintiff tendered a reply to Defendant's Reply in Support of its Motion to Dismiss. (Doc. # 13 at 1 n.1). In accordance with Joint Local Rule 7.1(g), the Court declined to consider the sur-reply. *Id.* Now, Plaintiff contends that the Court should consider the sur-reply, because Plaintiff's counsel misunderstood the Clerk's docket entry.[1] (Doc. # 15 at 1). Plaintiff's argument is not persuasive. The docket entry clearly stated that "leave of court is required to file a Sur-Reply" and directed Plaintiff to the appropriate local rule for reference. It is not the function of the Court to sua sponte explain to counsel how to comply with local

---

[1] The Clerk's entry stated as follows: "Joint Local Rule 7.1(g) provides a motion is submitted for a decision...after the reply memorandum is filed; therefore, leave of court is required to file a Sur-Reply; clerk modified the text of the entry to state the pleading is TENDERED; NO further action required by counsel."

rules. If counsel did not understand the entry, he could have requested clarification from the Court or the Clerk's office. Moreover, the explanation provided in the Clerk's docket entry was clear. Plaintiff was free to request leave to file a sur-reply, but declined to do so. Accordingly, the Court was not required to consider the tendered sur-reply.[2]

C. Timeliness of request for Appeals Council review

Plaintiff asserts, once again, that his request for Appeals Council review was submitted within sixty days of receipt of the hearing decision. (Doc. # 15 at 2). The Social Security Administration's regulations governing when a form is considered filed provide as follows:

> (a) General rule. Except as otherwise provided in paragraph (b) of this section ... an application for benefits, or a written statement, request, or notice is filed on the day it is received by an SSA employee at one of our offices or by an SSA employee who is authorized to receive it at a place other than one of our offices.
>
> (b) Other places and dates of filing. We will also accept as the date of filing – ...
>
> (2) The date an application for benefits or a written statement, request or notice is mailed to us by the U.S. mail, if using the date we receive it would result in the

---

[2] The Court notes that consideration of the sur-reply would not have altered its analysis. The sur-reply did not contain any arguments, nor offer any evidence, that differed from Plaintiff's Response to the Commissioner's Motion to Dismiss. (Doc. # 12).

> loss or lessening of rights. The date shown by a U.S. postmark will be used as the date of mailing. If the postmark is unreadable, or there is no postmark, we will consider *other evidence* of when you mailed it to us.

20 C.F.R. 404.614 (emphasis added). Despite the language in the governing regulations, Plaintiff has not offered any evidence to show that his request was timely. Absent some offer of proof, such as a postmark or receipt, the Court finds no reason to alter its prior judgment.

D. ALJ signature on the hearing decision

Finally, Plaintiff argues that the Court erred in finding that ALJ Paris was permitted to sign the hearing decision. (Doc. # 15 at 4). According to the Social Security Administration's procedural manual ("HALLEX"), when an ALJ approves a final draft decision but is unavailable to sign the decision, the Hearing Office Chief ALJ has the authority to sign the final decision. HALLEX I-2-8-40. Accordingly, this Court previously found that ALJ Paris had the authority to sign the hearing decision if ALJ Bowling was not available. (Doc. # 13 at 4).

Plaintiff contests this Court's prior finding for two reasons. First, Plaintiff claims that ALJ Bowling was, in fact, available. (Doc. # 15 at 4). However, Plaintiff does not offer any evidence in support of this assertion. The Court has no reason to believe that ALJ Bowling was available, yet neglected to sign the hearing decision. Second, Plaintiff claims that ALJ Paris has engaged in a "pattern of fraud" by signing hearing decisions for other ALJs. *Id.* at 5. In an attempt to support his accusation, Plaintiff

cites to another case in which ALJ Paris signed the hearing decision authored by a different ALJ – *Creech v. Comm'r of Soc. Sec.*, No. 5:13-CV-87-ART, 2013 WL 12101109 (E.D. Ky. Nov. 13, 2013). However, the Sixth Circuit affirmed the District Court's conclusion that the Hearing Office Chief ALJ may sign a decision on behalf of the ALJ who conducted the hearing. *Creech v. Comm'r of Soc. Sec.*, 581 Fed. App'x 519, 520 (6th Cir. 2014). Thus, Plaintiff's argument is without merit.

IV. CONCLUSION

Accordingly, for the reasons stated herein,

IT IS ORDERED that Plaintiff's Motion for Relief pursuant to Federal Rule of Civil Procedure 59(e) (Doc. #15) is **denied**.

This 11th day of May, 2017.

Signed By:
/s/David L. Bunning
David L. Bunning
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

CIVIL ACTION NO. 16-3-DLB

RICKY LEE SMITH

PLAINTIFF

vs.

CAROLYN W. COLVIN, Acting Commissioner of Social Security

DEFENDANT

MEMORANDUM ORDER

****

This matter is before the Court on Defendant Commissioner's Motion to Dismiss Plaintiff's Complaint. (Doc. # 8). Plaintiff having filed a Response (Doc. # 9), and Defendant having filed a Reply to Plaintiff's Response (Doc. # 11), this matter is now ripe for the Court's review.[1]

Plaintiff filed an application for benefits under Title XVI of the Social Security Act. On February 18, 2014, Plaintiff attended a Social Security hearing before Administrative Law Judge ("ALJ") Robert Bowl-

---

[1] Plaintiff also tendered a reply to Defendant's Reply. (Doc. # 12). However, Joint Local Rule 7.1(g) provides a motion is submitted for a decision after the reply memorandum is filed. Therefore, leave of court is required to file a reply to a Reply. Accordingly, the clerk entered a notice of deficiency and modified the entry as a tendered sur-reply. Because Plaintiff never sought leave to file, the tendered sur-reply (Doc. # 12) will not be considered by the Court.

ing. (Doc. # 9 at 1). On March 26, 2014, ALJ Don Paris issued a decision on behalf of ALJ Bowling denying Plaintiff's claim. (*Id.* at Ex. 1). Pursuant to the regulations governing further review of Social Security applications, Plaintiff had sixty (60) days to appeal the ALJ's decision to the Commissioner's Appeals Council. 20 C.F.R. § 416.1468. Plaintiff claims that he mailed a written request for review to the Appeals Council on April 24, 2014. (Doc. # 9 at 1). On September 21, 2014, Plaintiff faxed a correspondence to the Jackson, Kentucky District Office of the Social Security Administration, inquiring as to the status of his appeal, and attaching a copy of his written request dated April 24, 2014. (*Id.* at Ex. 3). In a letter dated October 1, 2014, a claims representative from the Jackson office informed Plaintiff that his request had not been placed in the "electronic folder," and that if the Appeals Council had received it, they would have mailed a receipt. (*Id.* at Ex. 4). The claims representative completed a Form HA-520 and mailed it to the Appeals Council, along with the written request that Plaintiff had attached to his September 21, 2014 correspondence. (*Id.*). Accordingly, the claims representative informed Plaintiff that his appeals request was filed as of that day, October 1, 2014. (*Id.*). On November 6, 2015, the Appeals Council dismissed Plaintiff's request for review for untimely filing. (*Id.* at Ex. 7). Plaintiff filed a complaint in this Court seeking review of the Appeals Council's dismissal of his request for appeal. (Doc. # 1).

Judicial review under the Social Security Act is limited to a "final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g); 20 C.F.R. § 416.1400. When a claimant is not satisfied with an ALJ's hearing decision, the claimant may request review from the Appeals

Council. 20 C.F.R. § 416.1467. Review by a federal court is only available once a claimant has completed all of the steps of the administrative review process. § 416.1400(a)(5). The Appeals Council may "deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge." § 416.1467. If the Appeals Council dismisses the request for review as untimely, the dismissal is binding and not subject to further review. §§ 416.1471, 416.1472.

In *Hilmes v. Secretary of Health & Human Services*, 983 F.2d 67 (6th Cir. 1993), the plaintiff was notified that he had sixty days to request a hearing before an ALJ as to his challenge to the date established by the SSA for onset of his disability. Plaintiff sought an extension of this appeal time, but then failed to request a hearing until after the extension had expired. The ALJ dismissed the request for a hearing as untimely. *Id.* at 68. In affirming the district court's dismissal of plaintiff's petition, the Sixth Circuit noted that the dismissal as untimely of plaintiff's request for a hearing presented nothing to be reviewed by a district court under 42 U.S.C. § 405(g). *Id.* at 69.

> ... this reading of § 405(g) has been adopted through the federal circuits in cases considering the reviewability of dismissals of hearing requests and refusals to reopen claims. While most of these cases involved decisions based on *res judicata*, the reason for the dismissal of the hearing request – so long as it does not implicate constitutional concerns – does not appear to affect the analysis.

Id. at 70 (footnote omitted). This rule was also applied in *Young*, where the court ruled that the "Ap-

peals Council's order dismissing Young's appeal as untimely was not a 'final decision' as that term has been defined by the Act and regulations." *Young v. Commissioner of Social Security*, 89 F.3d 837, 1996 WL 343527, at *1 (6th Cir. June 20, 1996) (Unpublished, Table Decision). Thus, a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim.

Plaintiff raises two arguments in response to Defendant's motion to dismiss, neither of which establish a colorable constitutional claim. First, Plaintiff disputes the Appeals Council's factual determination that his appeal was untimely. However, Plaintiff does not offer any proof that he mailed his written request on April 24, 2014, aside from his own testimony. Absent independent evidence, such as a postmark or dated receipt, this Court cannot reverse the Appeals Council's determination that the written request for appeal was untimely.

Next, Plaintiff argues that he suffered due process violations because ALJ Paris signed the hearing decision, rather than the ALJ who presided over the hearing. (Doc. # 9 at 3). Due process principles do apply to Social Security proceedings. *Perales v. Richardson*, 403 U.S. 389, 401-02 (1971). The Sixth Circuit has held that the procedures in the Social Security procedural manual, referred to as "HALLEX," satisfy due process. *Robinson v. Barnhart*, 124 Fed. App'x. 405, 410 (6th Cir. 2005) (citing *Adams v. Massanari*, 55 Fed.Appx. 279, 2003 WL 173011, at **4-8 (6th Cir. Jan. 23, 2003)). HALLEX provides that when the ALJ who conducted a hearing is unavailable to sign the decision, the Hearing Office Chief

Administrative Law Judge may sign the decision on behalf of the presiding ALJ, if the presiding ALJ has approved the final draft decision. HALLEX I-2-8-40. Accordingly, ALJ Paris had the authority to sign the hearing decision if ALJ Bowling was not available. Therefore, because the ALJs' actions were appropriate under HALLEX, Plaintiff's due process rights were not violated.

As there is no judicial review available for the Commissioner's dismissal of Plaintiff's request for appeal as untimely, and Plaintiff has made no colorable constitutional claims, Plaintiff's Complaint must be dismissed. Accordingly,

IT IS ORDERED as follows:

(1) Defendant's Motion to Dismiss (Doc. # 8) is hereby **granted**; and

(2) Plaintiff's Complaint (Doc. # 1) is hereby **dismissed**, and this matter is **stricken** from this Court's active docket.

This 12th day of January, 2017.

Signed By:
/s/David L. Bunning
David L. Bunning
United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

No. 17-1606

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION OF THE RESPONDENT FOR DIVIDED ORAL ARGUMENT

Pursuant to Rules 21 and 28.4 of the Rules of this Court, the Solicitor General, on behalf of the Acting Commissioner of Social Security, respectfully moves for divided argument in this case. This case presents the question whether a decision of the Social Security Administration (SSA) Appeals Council dismissing as untimely a request for review of a decision issued by an Administrative Law Judge (ALJ) after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. 405(g). The

government requests that petitioner and the government each be allotted 15 minutes of argument time and that the appointed amicus curiae be allotted 30 minutes of argument time. Counsel for petitioner does not object to this request.

Petitioner filed an application for supplemental-security-income benefits under the Social Security Act on the basis of disability. After a hearing, an ALJ issued a decision denying his claim for benefits. The Appeals Council subsequently issued an order dismissing his appeal as untimely, finding that his appeal request had not been filed within 60 days, as required by 20 C.F.R. 416.1468(a). Petitioner then filed an action in federal district court seeking judicial review of the Appeals Council's order. The district court granted the Acting Commissioner's motion to dismiss the complaint on the ground that the Appeals Council's order was not a "final decision * * * made after a hearing," as required by 42 U.S.C. 405(g) for judicial review. The court of appeals affirmed, relying partly on an SSA regulation providing that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. 416.1472. Petitioner has an obvious interest in being able to proceed with his challenge to the lower courts' dismissal of his claim seeking judicial review of SSA's denial of his claim for disability benefits.

The Acting Commissioner of Social Security is the other party, and she is a party in all district court proceedings challenging

an Appeals Council order dismissing a request for review as untimely. Although the government agrees with petitioner, after further review of the question, that Section 405(g) authorizes judicial review in his case because the Appeals Council's dismissal order was a final decision after a hearing, the government has a substantial interest in the proper application of Section 405(g). Section 405(g) governs the availability of judicial review in all cases arising from the agency's denial of a claim for benefits. In Fiscal Year 2017, the Appeals Council dismissed approximately 2500 requests for review as untimely. See Resp. Br. 43 n.17. The government is also well positioned to address the impact of SSA's regulations on the availability of judicial review under Section 405.

The government's participation in oral argument in this case is warranted for the additional reason that petitioner and the government have a material disagreement about the scope of judicial review that Section 405(g) authorizes. Petitioner contends that, following the Appeals Council's dismissal order, the district court was permitted to review his ultimate entitlement to disability benefits if the court disagreed with SSA's timeliness conclusion, see Pet. Br. 24-25, whereas the government contends that judicial review was limited only to the timeliness ground that was the basis for the agency's decision, see Resp. Br. 29-30. That question is the subject of its own conflict among the courts

of appeals. See id. at 30. Division of argument will therefore materially assist the Court in its consideration of this case.

For the foregoing reasons, the government requests that the Court grant the motion for divided argument.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

FEBRUARY 2019

No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com
Counsel for Petitioner

NOEL J. FRANCISCO
Solicitor General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel for Respondent

DEEPAK GUPTA
Gupta Wessler PLLC
1900 L Street, N.W., Ste. 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com
Amicus Curiae *in Support of the Judgment Below*

Petition for Writ of Certiorari Filed May 25, 2018
Certiorari Granted November 2, 2018

TABLE OF CONTENTS

Relevant Docket Entries 1

Administrative Law Judge Decision (Mar. 26, 2014) [D. Ct. Dkt. No. 8-1] 4

Letter from Wolodymyr Cybriwsky to Appeals Council (Apr. 24, 2014) [D. Ct. Dkt. No. 9-2] 24

Fax from Wolodymyr Cybriwsky to Brad Salisbury (Sept. 21, 2014) [D. Ct. Dkt. No. 9-3] 30

Letter from Brad Salisbury to Wolodymyr Cybriwsky (Oct. 1, 2014) [D. Ct. Dkt. No. 9-4] ... 38

Appeals Council Order Dismissing Review (Nov. 6, 2015) [D. Ct. Dkt. No. 9-7] 40

Letter from Brad Salisbury to Wolodymyr Cybriwsky (Nov. 18, 2015) [D. Ct. Dkt. No. 9-8] 43

Complaint (Jan. 5, 2016) [D. Ct. Dkt. No. 1] 45

Declaration of Kathie Hartt (Feb. 19, 2016) [D. Ct. Dkt. No. 8-1] 48

Relevant Docket Entries

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY (LEXINGTON)

Ricky Lee Smith,
Plaintiff,
v.
Commissioner of SSA,
Defendant.

No. 5:16-cv-00003-DLB

NO.	DATE	DESCRIPTION
1	01/05/2016	COMPLAINT.
		* * *
8	03/14/2016	MOTION to Dismiss by Commissioner of SSA.
9	03/31/2016	RESPONSE in Opposition re 8 MOTION to Dismiss by Commissioner of SSA.
		* * *
11	04/14/2016	REPLY to Response to Motion re 8 MOTION to Dismiss by Commissioner of SSA.
		* * *
13	01/12/2017	MEMORANDUM ORDER: 1. Defendant's Motion to Dismiss 8 is granted; 2. Plaintiff's Complaint 1 is dismissed and

NO.	DATE	DESCRIPTION
		matter is stricken from active docket.
14	01/12/2017	JUDGMENT: 1. Plaintiff's complaint against Commissioner is DISMISSED WITH PREJUDICE.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ricky Lee Smith,
Plaintiff – Appellant,

v.

Commissioner of Social Security,
Defendant – Appellee.

No. 17-5809

NO.	DATE	DESCRIPTION
1	07/07/2017	Civil Case Docketed.
		* * *
13	09/12/2017	APPELLANT BRIEF filed.
		* * *
20	10/05/2017	APPELLEE BRIEF filed.
		* * *
22	01/26/2018	OPINION and JUDGMENT filed: AFFIRMED.
		* * *

Administrative Law Judge Decision (Mar. 26, 2014)

SOCIAL SECURITY ADMINISTRATION
Refer To: [redacted]

Office of Disability Adjudication and Review
SSA ODAR Hearing Office
Suite 210
2241 Buena Vista Road
Lexington, KY 40505

Date: March 26, 2014

Form HA-L76-OP2 (03-2010)

Ricky Lee Smith
80 John Street
Jackson, KY 41339

Notice of Decision – Unfavorable

I carefully reviewed the facts of your case and made the enclosed decision. Please read this notice and my decision.

If You Disagree With My Decision

If you disagree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must ask in writing that the Appeals Council review my decision. You may use our Request for Review form (HA-

520) or write a letter. The form is available at www.socialsecurity.gov. Please put the Social Security number shown above on any appeal you file. If you need help, you may file in person at any Social Security or hearing office.

Please send your request to:

Appeals Council
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255

Time Limit To File An Appeal

You must file your written appeal **within 60 days** of the date you get this notice. The Appeals Council assumes you got this notice 5 days after the date of the notice unless you show you did not get it within the 5-day period.

The Appeals Council will dismiss a late request unless you show you had a good reason for not filing it on time.

What Else You May Send Us

You or your representative may send us a written statement about your case. You may also send us new evidence. You should send your written statement and any new evidence **with your appeal**. Sending your written statement and any new evidence with your appeal may help us review your case sooner.

How An Appeal Works

The Appeals Council will consider your entire case. It will consider all of my decision, even the parts with which you agree. Review can make any part of my decision more or less favorable or unfavorable to you. The rules the Appeals Council uses are in the Code of Federal Regulations, Title 20, Chapter III, Part 416 (Subpart N).

The Appeals Council may.

- Deny your appeal,
- Return your case to me or another administrative law judge for a new decision,
- Issue its own decision, or
- Dismiss your case.

The Appeals Council will send you a notice telling you what it decides to do. If the Appeals Council denies your appeal, my decision will become the final decision.

The Appeals Council May Review My Decision On Its Own

The Appeals Council may review my decision even if you do not appeal. If the Appeals Council reviews your case on its own, it will send you a notice within 60 days of the date of this notice.

When There Is No Appeals Council Review

If you do not appeal and the Appeals Council does not review my decision on its own, my decision will

become final. A final decision can be changed only under special circumstances. You will not have the right to Federal court review.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits or not qualify for benefits at all. If you disagree with my decision, you should file an appeal within 60 days.

If You Have Any Questions

We invite you to visit our website located at www.socialsecurity.gov to find answers to general questions about social security. You may also call (800) 772-1213 with questions. If you are deaf or hard of hearing, please use our TTY number (800) 325-0778.

If you have any other questions, please call, write, or visit any Social Security office. Please have this notice and decision with you. The telephone number of the local office that serves your area is (866) 366-4920. Its address is:

Social Security
850 Ky-15 N
Jackson, KY 41339-8284

Robert B. Bowling
Administrative Law Judge

Enclosures.
Decision Rationale
Form HA-L39 (Exhibit List)

cc: Wolodymyr Cybriwsky, Esq
214 South Central Ave
Prestonsburg, KY 41653

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF	**CLAIM FOR**
Ricky Lee Smith (Claimant)	Supplemental Security Income
_____ (Wage Earner)	[redacted] (Social Security Number)

JURISDICTION AND PROCEDURAL HISTORY

On August 7, 2012, the claimant filed an application for supplemental security income, alleging disability beginning September 18, 1987. The claim was denied initially on September 6, 2012, and upon reconsideration on December 6, 2012. Thereafter, the claimant filed a written request for hearing on December 14, 2012 (20 CFR 416.1429 *et seq.*) On February 18, 2014, the undersigned held a video hearing (20

CFR 416.1436(c)) The claimant appeared in Hazard, Kentucky, and the undersigned presided over the hearing from Lexington, Kentucky. Laura Whitten, an impartial vocational expert, also appeared at the hearing. The claimant is represented by Wolodymyr Cybriwsky, an attorney.

Under Social Security Administration (SSA) policy, if a determination or decision on a disability claim has become final, the Agency may apply administrative res judicata with respect to a subsequent disability claim under the same title of the Act if the same parties, facts, and issues are involved in both the prior and subsequent claims. However, if the subsequent claim involves deciding whether the claimant is disabled during a period that was not adjudicated in the final determination or decision on the prior claim, SSA considers the issue of disability with respect to the unadjudicated period to be a new issue that prevents the application of administrative *res judicata*. Thus, when adjudicating a subsequent disability claim involving an unadjudicated period, SSA considers the facts and issues *de novo* in determining disability with respect to the unadjudicated period. The Sixth Circuit concluded that where a final decision of SSA after a hearing on a prior disability claim contains a finding of a claimant's residual functional capacity, SSA may not make a different finding in adjudicating a subsequent disability claim with an unadjudicated period arising under the same title of the Act as the prior claim unless new and additional evidence or changed circumstances provide a basis for a different finding of the claimant's residual functional capacity (Acquiescence Ruling 98-4 (6), *Drummond v Commissioner of Social Security*, 126 F 3d 837 (6th Cir 1997)).

In this case, the record shows that on September 18, 1987, the claimant filed an application for a supplemental security income. On October 13, 1988, an Administrative Law Judge issued a favorable decision (Exhibit B4A). The claimant received benefits until October 2004, when he was found to be over the resource limit for supplemental security income (Exhibit B178). The undersigned now finds that the current claim involves deciding whether the claimant is disabled during a period that was not adjudicated in the final decision on the prior claim, and, as discussed in detail in the decision below, the undersigned finds that the record contains new and additional evidence that provides a basis for a different outcome. In the more than 25 years since the 1988 decision, the claimant's condition has changed. He has developed a new impairment of hypertension, and his older back tumor and urinary tract infections have required less treatment.

ISSUES

The issue is whether the claimant is disabled under section 1614(a)(3)(A) of the Social Security Act. Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.

Although supplemental security income is not payable prior to the month following the month in which the application was filed (20 CFR 416.335), the undersigned has considered the complete medical history consistent with 20 CFR 416.912(d).

After careful consideration of all the evidence, the undersigned concludes the claimant has not been under a disability within the meaning of the Social Security Act since August 7, 2012, the date the application was filed.

APPLICABLE LAW

Under the authority of the Social Security Act, the Social Security Administration has established a five-step sequential evaluation process for determining whether an individual is disabled (20 CFR 416.920(a)). The steps are followed in order. If it is determined that the claimant is or is not disabled at a step of the evaluation process, the evaluation will not go on to the next step.

At step one, the undersigned must determine whether the claimant is engaging in substantial gainful activity (20 CFR 416.920(b)). Substantial gainful activity (SGA) is defined as work activity that is both substantial and gainful. "Substantial work activity" is work activity that involves doing significant physical or mental activities (20 CFR 416.972(a)). "Gainful work activity" is work that is usually done for pay or profit, whether or not a profit is realized (20 CFR 416.972(b)). Generally, if an individual has earnings from employment or self-employment above a specific level set out in the regulations, it is presumed that he has demonstrated the ability to engage in SGA (20 CFR 416.974 and 416.975). If an individual engages in SGA, he is not disabled regardless of how severe his physical or mental impairments are and regardless of his age, education, and work experience. If the individual is not engaging in SGA, the analysis proceeds to the second step.

At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" or a combination of impairments that is "severe" (20 CFR 416.920(c)). An impairment or combination of impairments is "severe" within the meaning of the regulations if it significantly limits an individual's ability to perform basic work activities. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work (20 CFR 416.921, Social Security Rulings (SSRs) 85-28, 96-3p and 96-4p). If the claimant does not have a severe medically determinable impairment or combination of impairments, he is not disabled. If the claimant has a severe impairment or combination of impairments, the analysis proceeds to the third step.

At step three, the undersigned must determine whether the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925, and 416.926). If the claimant's impairment or combination of impairments is of a severity to meet or medically equal the criteria of a listing and meets the duration requirement (20 CFR 416.909), the claimant is disabled. If it does not, the analysis proceeds to the next step.

Before considering step four of the sequential evaluation process, the undersigned must first determine the claimant's residual functional capacity (20 CFR 416.920(e)). An individual's residual functional capacity is his ability to do physical and mental work

activities on a sustained basis despite limitations from his impairments. In making this finding, the undersigned must consider all of the claimant's impairments, including impairments that are not severe (20 CFR 416.920(e) and 416.945, SSR 96-8p).

Next, the undersigned must determine at step four whether the claimant has the residual functional capacity to perform the requirements of his past relevant work (20 CFR 416.920(f)). The term past relevant work means work performed (either as the claimant actually performed it or as it is generally performed in the national economy) within the last 15 years or 15 years prior to the date that disability must be established. In addition, the work must have lasted long enough for the claimant to learn to do the job and have been SGA (20 CFR 416960(b) and 416.965). If the claimant has the residual functional capacity to do his past relevant work, the claimant is not disabled. If the claimant is unable to do any past relevant work or does not have any past relevant work, the analysis proceeds to the fifth and last step.

At the last step of the sequential evaluation process (20 CFR 416.920(g)), the undersigned must determine whether the claimant is able to do any other work considering his residual functional capacity, age, education, and work experience. If the claimant is able to do other work, he is not disabled. If the claimant is not able to do other work and meets the duration requirement, he is disabled. Although the claimant generally continues to have the burden of proving disability at this step, a limited burden of going forward with the evidence shifts to the Social Security Administration. In order to support a finding that an individual is not disabled at this step, the Social Secu-

rity Administration is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the residual functional capacity, age, education, and work experience (20 CFR 416.912(g) and 416.960(c)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the undersigned makes the following findings:

1. The claimant has not engaged in substantial gainful activity since August 7, 2012, the application date (20 CFR 416.971 *et seq.*).

The claimant testified that he has not worked since the 1980s. Records show a lack of income after 1985 (Exhibit B2D/l). Accordingly, the claimant has not engaged in substantial gainful activity since his application date.

2. The claimant has the following medically determinable impairments: disorders of the spine, urinary tract infections, diverticulitis, hypertension, depression, and anxiety (20 CFR 416.921 *et seq.*).

3. The claimant does not have an impairment or combination of impairments that has significantly limited (or is expected to significantly limit) the ability to perform basic work-related activities for 12 consecutive months; therefore, the claimant docs not have a severe impairment or combination of impairments (20 CFR 416.921 *et seq.*).

Basic work activities are the abilities and aptitudes necessary to do most jobs. Examples of these include:

1. Physical functions such a walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling,

2. Capacities for seeing, hearing, and speaking,

3. Understanding, carrying out, and remembering simple instructions,

4. Use of judgment,

5. Responding appropriately to supervision, coworkers, and usual work situations; and

6. Dealing with changes in a routine work setting (SSR-85-28).

In reaching the conclusion that the claimant does not have an impairment or combination of impairments that significantly limits his ability to perform basic work activities, the undersigned has considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 416.929 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 416.927 and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

In considering the claimant's symptoms, the undersigned must follow a two-step process in which it must first be determined whether there is an underlying medically determinable physical or mental impairment(s)—i.e., an impairment(s) that can be shown

by medically acceptable clinical and laboratory diagnostic techniques—that could reasonably be expected to produce the claimant's pain or other symptoms.

Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the claimant's pain or other symptoms has been shown, the undersigned must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which they limit the claimant's functioning. For this purpose, whenever statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the undersigned must make a finding on the credibility of the statements based on a consideration of the entire case record.

The claimant alleged that he became disabled in September 1987 due to a tumor on his spine. The growth was removed but subsequently resurfaced. The claimant asserted that he has pain and a sensation of bee stings in his hands, back, feet, and left leg. As a result, he is unable to sit more than 20 minutes, stand more than 20 minutes, walk more than a half mile, or lift and carry more than a gallon of milk. The back complications have caused the claimant to need to self-catheterize since 1997, resulting in urinary tract infections. Doctors responded by prescribing the claimant Lortab for pain, Phenergan for nausea, Dicyclomine for diverticulitis, and Lisinopril for hypertension (Exhibit B12E/1). The claimant was prescribed Prilosec for acid reflux but can no longer afford the medication. He stated that the prescriptions do not have side effects.

The 1988 favorable disability decision followed the identification and removal of a tumor on the claimant's lumbar spine (Exhibit B3F/89, 98-100). The lesion extended from L2-L4 and contributed to urinary frequency and hesitancy (Exhibit B3F/98). However, the tumor had resurfaced by 1996, prompting John Gilbert, M.D. to recommend a second surgery (Exhibit B8F/80). The claimant initially declined, and the mass remained stable through 2002 (Exhibit B3F/35). He later testified that a tumor was removed in 2002 or 2003, but an updated imaging report from August 2006 showed a recurrent growth and disc protrusion at L2-L3 (Exhibits B1F/6, B3F/2). The claimant continued experiencing back pain in the year leading up to his current application for disability benefits (Exhibit B9F/21). In June 2011, he informed treating physician Edwin Santos, M.D. that he had nausea as well as pain in his low back and feet, which favorably responded to prescriptions Phenergan and Lortab (Exhibit B9F/21-22). Dr. Santos identified tenderness in the claimant's mid-back region but noted that the claimant had no similar problems in the lower extremities (Exhibit B9F/22). Despite the complaints, the claimant retained a normal gait (Exhibit B9F/22). An April 2012 update revealed that he denied back pain when in the emergency room for a urinary tract infection (Exhibit B8F/10). Medical professionals at the hospital observed the claimant's normal extremity movement and ambulatory ability (Exhibit B8F/8). When the claimant returned to Dr. Santos's office in July 2012, he saw nurse Mike Myers, APRN (Exhibit B9F/39). Mr. Myers again found tenderness in the lumbar spine and kept the claimant on his existing prescriptions (Exhibit B9F/39). The claimant retained a normal gait in subsequent appointments (Exhibit

B10F/2). In January 2013, Mr. Myers began identifying reduced spinal range of motion, including a positive straight-leg raising test (Exhibit B12F/2). The results were repeated in the most recent record from March, but in both appointments the claimant retained a normal gait (Exhibit 12F/4). The updates also differed from prior reports because Mr. Myers no longer found tenderness in the spinal region (Exhibit B12F/2). The claimant testified at his hearing that the pain-related impairments are controlled by his prescription Lortab. This admission, combined with the observations of a normal gait and the lack of recent spinal treatment, support a finding that the back disorder is not severe.

The claimant's back-related urinary problems have been exacerbated by his poor finances, which cause him to use old catheters. In March 2005, urologist Thomas Slabaugh, M.D., admitted the claimant to the hospital for four days with a chronic urinary infection (Exhibit B1F/6). Dr. Slabaugh responded with antibiotics and sterile catheters before discharging the claimant with prescription Keflex (Exhibit B1F/5). However, the claimant's financial problems continued to interfere with proper catheter usage and resulted in repeated infections (Exhibit B4F/3). The most recent documented emergency room visit for the condition occurred in April 2012 (Exhibit B8F/5). Hospital staff noted that the claimant had inguinal swelling and provided him with medications (Exhibit B8F/5). The claimant testified that he no longer receives hospital care for urinary tract infections. Instead, Mr. Myers provides him with antibiotics to take at home. The lack of treatment following the alleged onset date undermines allegations that the urinary tract infections are severe.

In August 2011, Dr. Santos identified a slightly elevated blood pressure of 121/61 and added hypertension to the claimant's list of impairments (Exhibit B9F/23). He ultimately responded with prescription Lisinopril (Exhibit B9F/41). The hypertension persisted under the monitoring of Mr. Myers with blood pressures rising to 122/76 in January 2013 and 130/80 in March 2013 (Exhibit B12F/1-3). Despite the diagnosis, the claimant admitted at his hearing that Lisinopril controls his hypertension. The close proximity of the claimant's blood pressure to 120/80 while on the prescription supports a finding that it is not severe.

Stephen Schindler, M.D. identified loose bowel movement complications as early as May 2001 (Exhibit B2F/3). The condition improved by October 2003, when Dr. Schindler described a lack of constipation, diarrhea, and rectal bleeding (Exhibit B2F/13). The physician indicated that the claimant did not have digestive symptoms while taking prescription Phenergan (Exhibit B2F/15, 17). The impairments do not appear in records following the August 2012 application for disability, and the claimant admitted that his diverticulitis was controlled on prescription Dicyclomine. Accordingly, it is not severe.

After considering the evidence of record, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to produce the alleged symptoms, however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision.

The claimant has not worked since 1986 (Exhibit B12E/1). His lack of employment is consistent with the alleged onset date and the prior favorable deter-

mination. However, the medical record and the claimant's own testimony demonstrate that his conditions have improved with prescribed treatment. The claimant's spinal disorder has not interfered with his normal gait, and his back tenderness has diminished in recent treatment notes (Exhibits B9F/22, B12F/2, 4).

Mr. Myers's identification of positive straight-leg raising tests in 2013 has not been confirmed by an acceptable medical source (Exhibit B12F/2,4). Meanwhile, the claimant described his diverticulitis and hypertension as controlled with medications. The urinary tract infections persist due to his inability to afford sterile catheters, but Mr. Myers has responded to them with at-home care rather than repeated hospitalizations. The claimant's testimony that he is not able to afford Prilosec and other forms of treatment is undermined by his continued smoking habit of a half pack per day. The use of cigarettes raises questions about resource allocation. In addition, the claimant's ability to live alone suggests that he performs a variety of chores that are inconsistent with his purported sitting, standing, walking, lifting, and carrying limitations.

As for the opinion evidence, the undersigned has evaluated each medical source's relationship to the claimant. 20 CFR 404.1527(d). Specifically, the factors considered were whether the professional examined the claimant, whether they served as a treating source, their area of specialty if any, the supportability of medical opinions, consistency with the record, and their knowledge of the procedure and the record as a whole.

The undersigned grants great weight to state agency consultant Carlos Hernandez, M.D. for finding no severe physical impairments (Exhibits B4A/7). Dr.

Hernandez's opinion is consistent with the claimant's above-mentioned response to treatment and the lack of continued care he has needed during the relevant period.

Mr. Myers receives little weight for his non-acceptable medical opinion under SSR 06-3p. The nurse opined that the claimant could not sit, stand, or walk for a combination of 8 hours per workday, thereby precluding employment (Exhibit B11F/2). Mr. Myers partially attributed the limitations to reduced strength in the claimant's lower extremities (Exhibit B11F/2). He also identified a positive straight-leg raising test in his 2013 reports (Exhibit 12F/2, 4). However, the opinion appears inconsistent with Dr. Santos's description of no tenderness in the lower extremities (Exhibit 9F/22). In addition, the claimant retained a normal gait throughout the record (Exhibits B8F/8; 9F/22, B10F/2).

The claimant's uncle, James Campbell, receives some weight for describing his nephew's impairments and limitations (Exhibit B6E). Despite identifying exertional restrictions, Mr. Campbell explained that the claimant remained able to live alone, care for his personal hygiene, prepare meals, wash laundry, and shop for necessities (Exhibit B6E/3-6). These activities are consistent with the nonsevere finding.

In terms of the mental impairments, state agency consultant Ilze Sillers, Ph.D. receives some weight for finding no medically determinable condition (Exhibit B4A/7). The claimant did not specifically allege depression or anxiety and testified that he had not pursued treatment for the conditions (Exhibit B4A/7). However, the undersigned still considered the impairments because they are referenced in the medical record by Dr. Gilbert and Dr. Schindler (Exhibits B2F/13,

B3F/76). The lack of treatment supports a finding that the depression and anxiety are not severe. Because the claimant has medically determinable mental impairments, the undersigned has considered the four broad functional areas set out in the disability regulations for evaluating mental disorders and in section 12.000C of the Listing of Impairments (20 CFR, Part 404, Subpart P, Appendix 1). These four broad functional areas are known as the "paragraph B" criteria.

The first functional area is activities of daily living. This is the only area in which the claimant has a limitation, and it is a mild one. The claimant testified that he does not wash dishes, vacuum, mop, garden, or mow his lawn. He does not usually cook, instead relying on meals away from the home. The claimant's difficulties appear to be the result of his physical rather than mental condition, though Dr. Gilbert and Dr. Schindler indicated there existed a strong correlation between the two (Exhibits B2F/13, B3F/76). The claimant retains the ability to live alone and drive a vehicle four or five times per week. He drove to his hearing from Cleveland, Ohio, where he was temporarily living to escape his unheated home.

The next functional area is social functioning. In this area, the claimant has no limitation. He described engaging in daily social activities. The claimant visits with friends that operate a gas station and a fruit stand. He also shops in stores and eats in restaurants. The claimant described attending high school basketball games on an infrequent basis.

The third functional area is concentration, persistence or pace. In this area, the claimant has no limitation. The record lacks evidence of attention difficulties, and the claimant admitted that he is able to concentrate on television and paying his bills.

The fourth functional area is episodes of decompensation. In this area, the claimant has experienced no episodes of decompensation which have been of extended duration.

Because the claimant's medically determinable mental impairments cause no more than "mild" limitation in any of the first three functional areas and "no" episodes of decompensation which have been of extended duration in the fourth area, they are nonsevere (20 CFR 416.920a(d)(1)).

In sum, the claimant's physical and mental impairments, considered singly and in combination, do not significantly limit the claimant's ability to perform basic work activities. Thus, the claimant does not have a severe impairment or combination of impairments.

4. The claimant has not been under a disability, as defined in the Social Security Act, since August 7, 2012, the date the application was filed (20 CFR 416.920(c)).

DECISION

Based on the application for supplemental security income filed on August 7, 2012, the claimant is not disabled under section 1614(a)(3)(A) of the Social Security Act.

/s/ Don C. Paris

for Robert B. Bowling
Robert B. Bowling
Administrative Law Judge

March 26, 2014
Date

Letter from Wolodymyr Cybriwsky to Appeals Council (Apr. 24, 2014)

Law Offices of
WOLODYMYR CYBRIWSKY
214 S. CENTRAL AVENUE
PRESTONSBURG, KENTUCKY 41653
PHONE: (606) 886-8389
FAX: (606) 886-1329

April 24, 2014

Appeals Council
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255

RE: Exceptions on Ricky Lee Smith
SSN: [redacted]-7791

Dear Sirs:

This is to acknowledge the receipt of Mr. Smith's denial decision dated March 26, 2014 and to hereby request a review which should result in a reversal and remand of this denial decision.

As the principal basis for vacating this denial decision, counsel notes that an ALJ Robert B. Bowling was assigned and had jurisdiction over this claim, and it was ALJ Robert B. Bowling who appeared and presided over Mr. Smith's claim 2/18/2014 televideo hearing, yet this denial decision of March 26, 2014 is signed by ALJ Don C. Paris, who took no part in Mr. Smith and obviously should have had no part in adjudicating Mr. Smith's claim. Allowing an ALJ who was never assigned to Mr. Smith's case, to then author

a denial decision is prima facie evidence of a decision which is not supported by substantial evidence and threatens to transform Mr. Smith's right to a de novo hearing into a mockery.

The only possible basis for allowing another ALJ to author an adjudication in which ALJ Robert B. Bowling presided is if ALJ Bowling died, retired, resigned, was ill or on leave from the Lexington Hearing Office for a period of twenty (20) days or more in February 2014 – March 26, 2014 period. Counsel contacted the Lexington office and confirmed that ALJ Bowling is alive, active, healthy and has not been absent from the office during this period and is continuing to hold hearings and presumably make adjudications. As such NONE of the conditions set forth in HALLEX 1-2-8-40 have even been considered let alone met. On that error alone and the clear violation of HALLEX 1-2-8-40, a copy of which we have enclosed, please take swift and corrective action. As a final note on this point, even if ALJ Paris could have qualified to author this adjudication, that HALLEX would have only allowed him to issue a fully favorable decision. Anything less would have required at least a supplemental hearing. Here, contrary to all the Commissioner's rules and regulations, a non-presiding ALJ discredits the Claimant's testimony and complaints and issues a denial decision.

Further, the Social Security Act provides that each Claimant has the statutory right to a de novo hearing under 42 U.S.C. § 405 (b) and due process rights under the Fifth Amendment, Fleming v. Nestor 363 U.S. 603, 611 (1960). Those right and guarantees were mocked by the Commissioner by this adjudication.

Second, as we pointed out to the presiding ALJ at the outset of the 2/18/2014 hearing, Mr. Smith was adjudicated to be disabled by the Social Security Administration back on 9/18/1987. He continued to be disabled and draw Social Security benefits until October 2004 at which time he was found ineligible due to excess resources. We again attach a statement from the Social Security District Office dated 2/18/2014 confirming that fact. Given that there is no SSA finding that Mr. Smith's medical condition has ever improved, once the resource issue had been resolved in Mr. Smith's favor, Mr. Smith should have been found eligible to again receive benefits. Clearly that did not occur here, when the SSA chose to disregard its previous finding of disability. Failure to obtain that earlier claims file and the evidence it contains fatally compromises any future adjudication, because it violates the requisites set forth in Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). The mere recitation by a non-participating ALJ claiming that Claimant's medical condition has changed in more than 25 years (see page 2 of 9) does not remotely satisfy the requirements of Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). Further, none of the "new and additional evidence" in this record document any medical improvement from Mr. Smith's previous disabled status, because none of medical examiners were even aware that there was a previous finding of disability or that the standard for review is whether or not Mr. Smith's medical condition has improved. With an incomplete record and the wrong standard of review, this denial decision is even more unsupported by the substantial evidence in the

record and needs to be vacated and remanded with strong corrective action.

Counsel can also show further that the probative medical evidence in this record proves that Mr. Smith continues to remain disabled, but given the substantial errors that have been identified above, that discussion will he held later when we have an appropriate record and the above errors are corrected.

WHEREFORE, counsel requests proper Order from the Appeals Council.

Respectfully submitted,

/s/Wolodymyr Cybriwsky
WOLODYMYR CYBRIWSKY

WC/mr
Enclosures

1-2-8-40. Administrative Law Judge Conducts Hearing but Is Unavailable to Issue Decision

Last Update: 5/16/08 (Transmittal I-2-71)

When an Administrative Law Judge (ALJ) who conducted a hearing in a case is not available to issue the decision because of death, retirement, resignation, illness which has caused the ALJ to be on leave for such illness for at least twenty days and which illness would keep the ALJ from fulfilling necessary duties, or other cause resulting in prolonged leave of twenty or more days, the Hearing Office Chief ALJ

(HOCALJ) will reassign the case to another ALJ. The ALJ to whom the case is reassigned will review the record and determine whether or not another hearing is required to issue a decision. The ALJ's review will include all of the evidence of record, including the audio recording of the hearing.

- If the ALJ is prepared to issue a fully favorable decision, another hearing would not be necessary.
- If the ALJ is prepared to issue a less than fully favorable decision, another hearing may be necessary. For example, another hearing would be necessary if relevant vocational expert opinion was not obtained at the hearing, or the claimant alleges disabling pain, and the ALJ believes the claimant's credibility and demeanor could be a significant factor in deciding the case.

If the ALJ holds a new hearing, the ALJ will consider all pertinent documentary evidence admitted into the record at the prior hearing, the oral testimony at the prior hearing, and the evidence and testimony adduced at the new hearing.

When a case is designated a critical case pursuant to HALLEX I-2-1-40, and the ALJ to whom such case is assigned is on leave for any reason for an extended period of time, the HOCALJ may, but is not required to, reassign the case to another ALJ. If reassignment is made, the ALJ to whom the case is reassigned will conduct the review in the same manner as for mandatory reassignment described above.

When an ALJ has approved a final decision draft but is unavailable to sign the final decision, the HOCALJ will have authority to sign the final deci-

sion/order on behalf of the ALJ who is temporarily unavailable to sign the final decision/order if the ALJ gave the HOCALJ prior affirmative written authorization to sign the decision/order for the ALJ

The authorization may be contained in an e-mail, fax, or other writing that includes all of the following:

- An affirmative statement that ALJ has read the decision/order; and
- An affirmative statement that the ALJ concurs with the decision/order as written, or, concurs with the decision/order with specified changes previously reviewed and approved by the ALJ before authorization; and
- An affirmative statement that "HOCALJ X" is authorized to sign the decision/order

The ALJ must sign any non email paper document affirmative written authorization with his/her "wet" signature. A **rubber** stamp or other mechanical signature is not acceptable or authorized under any circumstances. (See HALLEX 1-2-8-1 General). If the above requirements are met, the HOCALJ would sign the decision/order "HOCALJ John Doe for ALJ Jane Smith."

The final decision/order signed by the HOCALJ, the draft decision/order approved by the ALJ and the ALJ's written authorization for the HOCALJ to sign the final decision/order on his/her behalf will be retained in the claims folder.

Fax from Wolodymyr Cybriwsky to Brad Salisbury (Sept. 21, 2014)

TRANSMITTAL

Attn:	Brad Salisbury
To:	Social Security Administration Jackson District Office
Of:	Jackson, KY. 41339
Fax:	(606) 666-9010
Phone:	(866) 295-4814
Pages:	6
Date:	9/21/2014

Re: Ricky Lee Smith
SSN: [redacted]-7791

Dear Sir or Madam,

Enclosed please a copy of the appeal which we filed with the Appeals Council on Mr. Smith's denial of 3/26/2014. This appeal was mailed to the Appeals Council back on 4/24/2014. Please advise us of the status of this appeal. If there are questions, please contact us. Thank you for your time and attention.

This information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually re-

ceiving this facsimile or any other reader of the facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

*NOT COUNTING COVER SHEET, IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (606) 886-8389.

/s/ Wally
Wally

EXHIBIT #3

From the desk of...
Wolodymyr Cybriwsky, Esq.
214 South Central Avenue
Prestonsburg, Kentucky 41653
(606) 886-8389
Fax: (606) 886-1329

Law Offices of
WOLODYMYR CYBRIWSKY
214 S. CENTRAL AVENUE
PRESTONSBURG, KENTUCKY 41653
PHONE: (606) 886-8389
FAX: (606) 886-1329

April 24, 2014

Appeals Council
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255

RE: Exceptions on Ricky Lee Smith
SSN: [redacted]-7791

Dear Sirs:

This is to acknowledge the receipt of Mr. Smith's denial decision dated March 26, 2014 and to hereby request a review which should result in a reversal and remand of this denial decision.

As the principal basis for vacating this denial decision, counsel notes that an ALJ Robert B. Bowling was assigned and had jurisdiction over this claim, and it was ALJ Robert B. Bowling who appeared and presided over Mr. Smith's claim 2/18/2014 televideo hearing, yet this denial decision of March 26, 2014 is signed by ALJ Don C. Paris, who took no part in Mr. Smith and obviously should have had no part in adjudicating Mr. Smith's claim. Allowing an ALJ who was never assigned to Mr. Smith's case, to then author a denial decision is prima facie evidence of a decision which is not supported by substantial evidence and threatens to transform Mr. Smith's right to a de novo hearing into a mockery.

The only possible basis for allowing another ALJ to author an adjudication in which ALJ Robert B. Bowling presided is if ALJ Bowling died, retired, resigned, was ill or on leave from the Lexington Hearing Office for a period of twenty (20) days or more in February 2014 – March 26, 2014 period. Counsel contacted the Lexington office and confirmed that ALJ

Bowling is alive, active, healthy and has not been absent from the office during this period and is continuing to hold hearings and presumably make adjudications. As such NONE of the conditions set forth in HALLEX 1-2-8-40 have even been considered let alone met. On that error alone and the clear violation of HALLEX 1-2-8-40, a copy of which we have enclosed, please take swift and corrective action. As a final note on this point, even if ALJ Paris could have qualified to author this adjudication, that HALLEX would have only allowed him to issue a fully favorable decision. Anything less would have required at least a supplemental hearing. Here, contrary to all the Commissioner's rules and regulations, a non-presiding ALJ discredits the Claimant's testimony and complaints and issues a denial decision.

Further, the Social Security Act provides that each Claimant has the statutory right to a de novo hearing under 42 U.S.C. § 405 (b) and due process rights under the Fifth Amendment, Fleming v. Nestor 363 U.S. 603, 611 (1960). Those right and guarantees were mocked by the Commissioner by this adjudication.

Second, as we pointed out to the presiding ALJ at the outset of the 2/18/2014 hearing, Mr. Smith was adjudicated to be disabled by the Social Security Administration back on 9/18/1987. He continued to be disabled and draw Social Security benefits until October 2004 at which time he was found ineligible due to excess resources. We again attach a statement from the Social Security District Office dated 2/18/2014 confirming that fact. Given that there is no SSA finding that Mr. Smith's medical condition has ever improved, once the resource issue had been resolved in Mr.

Smith's favor, Mr. Smith should have been found eligible to again receive benefits. Clearly that did not occur here, when the SSA chose to disregard its previous finding of disability. Failure to obtain that earlier claims file and the evidence it contains fatally compromises any future adjudication, because it violates the requisites set forth in Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). The mere recitation by a non-participating ALJ claiming that Claimant's medical condition has changed in more than 25 years (see page 2 of 9) does not remotely satisfy the requirements of Drummond v. Commissioner of SSA, 126 F. 3d 837 (6th Cir. 1997) and the Commissioner's adoption of those mandates in Acquiescence Ruling 97-1(6). Further, none of the "new and additional evidence" in this record document any medical improvement from Mr. Smith's previous disabled status, because none of medical examiners were even aware that there was a previous finding of disability or that the standard for review is whether or not Mr. Smith's medical condition has improved. With an incomplete record and the wrong standard of review, this denial decision is even more unsupported by the substantial evidence in the record and needs to be vacated and remanded with strong corrective action.

Counsel can also show further that the probative medical evidence in this record proves that Mr. Smith continues to remain disabled, but given the substantial errors that have been identified above, that discussion will he held later when we have an appropriate record and the above errors are corrected.

WHEREFORE, counsel requests proper Order from the Appeals Council.

Respectfully submitted,

/s/Wolodymyr Cybriwsky
WOLODYMYR CYBRIWSKY

WC/mr
Enclosures

1-2-8-40. Administrative Law Judge Conducts Hearing but Is Unavailable to Issue Decision

Last Update: 5/16/08 (Transmittal I-2-71)

When an Administrative Law Judge (ALJ) who conducted a hearing in a case is not available to issue the decision because of death, retirement, resignation, illness which has caused the ALJ to be on leave for such illness for at least twenty days and which illness would keep the ALJ from fulfilling necessary duties, or other cause resulting in prolonged leave of twenty or more days, the Hearing Office Chief ALJ (HOCALJ) will reassign the case to another ALJ. The ALJ to whom the case is reassigned will review the record and determine whether or not another hearing is required to issue a decision. The ALJ's review will include all of the evidence of record, including the audio recording of the hearing.

- If the ALJ is prepared to issue a fully favorable decision, another hearing would not be necessary.

- If the ALJ is prepared to issue a less than fully favorable decision, another hearing may be necessary. For example, another hearing would be necessary if relevant vocational expert opinion was not obtained at the hearing, or the claimant alleges disabling pain, and the ALJ believes the claimant's credibility and demeanor could be a significant factor in deciding the case.

If the ALJ holds a new hearing, the ALJ will consider all pertinent documentary evidence admitted into the record at the prior hearing, the oral testimony at the prior hearing, and the evidence and testimony adduced at the new hearing.

When a case is designated a critical case pursuant to HALLEX I-2-1-40, and the ALJ to whom such case is assigned is on leave for any reason for an extended period of time, the HOCALJ may, but is not required to, reassign the case to another ALJ. If reassignment is made, the ALJ to whom the case is reassigned will conduct the review in the same manner as for mandatory reassignment described above.

When an ALJ has approved a final decision draft but is unavailable to sign the final decision, the HOCALJ will have authority to sign the final decision/order on behalf of the ALJ who is temporarily unavailable to sign the final decision/order if the ALJ gave the HOCALJ prior affirmative written authorization to sign the decision/order for the ALJ

The authorization may be contained in an e-mail, fax, or other writing that includes all of the following:

- An affirmative statement that ALJ has read the decision/order; and

- An affirmative statement that the ALJ concurs with the decision/order as written, or, concurs with the decision/order with specified changes previously reviewed and approved by the ALJ before authorization; and
- An affirmative statement that "HOCALJ X" is authorized to sign the decision/order

The ALJ must sign any non email paper document affirmative written authorization with his/her "wet" signature. A **rubber** stamp or other mechanical signature is not acceptable or authorized under any circumstances. (See HALLEX 1-2-8-1 General). If the above requirements are met, the HOCALJ would sign the decision/order "HOCALJ John Doe for ALJ Jane Smith."

The final decision/order signed by the HOCALJ, the draft decision/order approved by the ALJ and the ALJ's written authorization for the HOCALJ to sign the final decision/order on his/her behalf will be retained in the claims folder.

Letter from Brad Salisbury to Wolodymyr Cybriwsky (Oct. 1, 2014)

Social Security Administration Atlanta Region

Refer to: 7791

850 HWY 15 North
Jackson, KY 41339
(866) 366-4920
October 1, 2014

Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

Dear Sir:

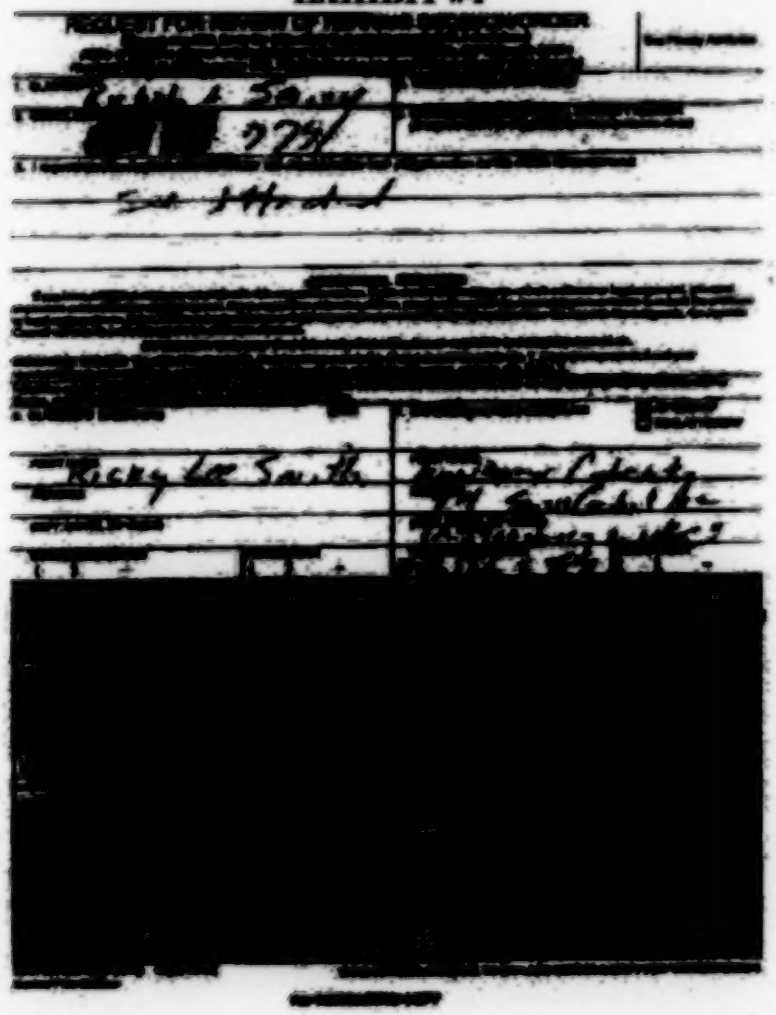
Our records still have Ricky Smith's mailing address as "80 John St, Jackson KY 41339". However, on 05/23/14 the Hearing office received Mr. Smith's copy of the ALJ 03/26/14 denial letter as Returned Mail. Please supply our office and the AC with Mr. Smith's current mailing address and phone number.

Your April Appeals Council request that you stated was mailed to the AC had not been placed in the electronic folder. If the AC had received it, they would have mailed you a receipt. Today, I completed the enclosed HA-520 and mailed it to the AC with your April letter and the September Fax sheet. I explained on an SSA 5002 that your fax sheet requesting status should serve as Good Cause for your late filing of the appeal. I did place all of the above directly into the electronic folder as well.

Therefore, the status of your AC request is that it is only being filed today, 10/01/14.

Sincerely,
Brad Salisbury, CR

EXHIBIT #4



Appeals Council Order Dismissing Review
(Nov. 6, 2015)

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255
Telephone (877) 670-2722
Date: November 6, 2015

Refer to: TLC
[redacted]-7791

NOTICE OF ORDER OF APPEALS COUNCIL DISMISSING REQUEST FOR REVIEW

Ricky Lee Smith
80 John Street
Jackson, KY 41339

What This Order Means

We have dismissed your request for review. In the enclosed order, we explain why we did this.

Under our rules, the dismissal of a request for review is final and not subject to further review.

If You Have Any Questions

If you have any questions, you may call, write, or visit any Social Security office. If you do call or visit an office, please have this notice with you. The telephone number of the local office that serves your area is (866)366-4920. Its address is:

Social Security
850 Ky-15 N
Jackson, KY 41339-8284

John Dawkins
Administrative Appeals Judge

cc:
Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW

ORDER OF APPEALS COUNCIL

In the case of	**Claim for**
Ricky Lee Smith (Claimant)	Supplemental Security Income
_____ (Wage Earner) (Leave blank if same as above)	[redacted]-7791 (Social Security Number)

This case is before the Appeals Council on the claimant's request for review of the Administrative Law Judge's decision issued on March 26, 2014. The request for review filed on October 1, 2014, was not filed within 60 days from the date notice of the decision was received as required by 20 CFR 416.1468(a). The date of receipt of such notice is presumed to be five (5) days after the date of such notice unless a reasonable showing to the contrary is made.

The regulations provide that the Appeals Council may dismiss a request for review where the claimant has failed to file the request within the stated period of time and the time for filing has not been extended

(20 CFR 416.1471). The time period will be extended if good cause is shown for missing the deadline (20 CFR 416.1468(b)).

The claimant's representative submitted a good cause statement on October 1, 2014 indicating he had previously filed a brief on April 24, 2014. The Administration did not receive this brief before October 1, 2014, nor has the representative supplied evidence indicating it was sent within the appropriate period of time.

The Appeals Council, therefore, finds that there is no good cause to extend the time for filing and, accordingly, dismisses the claimant's request for review. The Administrative Law Judge's decision stands as the final decision of the Commissioner.

Notice of this action is hereby given by mailing a copy to the claimant and the representative.

APPEALS COUNCIL

/s/ John Dawkins
John Dawkins
Administrative Appeals Judge

Date: November 6, 2015

Claimant's Name and Address:
Ricky Lee Smith
80 John Street
Jackson, KY 41339

Representative's Name and Address:
Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

Letter from Brad Salisbury to Wolodymyr Cybriwsky (Nov. 18, 2015)

Social Security Administration Atlanta Region

Refer to: R Smith

850 HWY 15 North
Jackson, KY 41339
(866)366-4920
November 18, 2015

Wolodymyr Cybriwsky
214 South Central Ave
Prestonsburg, KY 41653

Dear Mr. Cybriwsky:

RE: Ricky Lee Smith

I received your messages this morning that you had left on 11/16/15 and 11/17/15 concerning the Appeals Council (AC) dismissal dated 11/06/15. I tried to call your office this morning but there was no answer.

On 10/01/14 we received your fax dated 09/21/14 asking for the status of your AC request that you stated was submitted 04/24/14. Since the 04/24/14 request was not found, I placed an SSA 5002 (report of contact SSA form) in the electronic folder with a copy of your AC request dated 04/24/14. The 10/01/14 fax would serve as your good cause for late filing.

The AC stated since the Administration did not receive this brief before 10/01/14, nor has evidence been supplied indicating the AC request was sent within the appropriate time, the AC finds that there was no good cause to extend the time for filing and dismisses the request for review. Therefore, the 03/26/14 ALJ's decision stands.

At this point, you can file an action in Federal district court within 60 days from the AC's Notice of Order of Appeals Council Dismissing Request for Review dated 11/06/15.

Sincerely,

/s/ C. Brad Salisbury, CR

Complaint (Jan. 5, 2016)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON

ELECTRONICALLY FILED

CIVIL ACTION NO.

RICKY LEE SMITH — PLAINTIFF
SSN: XXX-XX-7791

VS. COMPLAINT

CAROLYN W. COLVIN,
ACTING COMMISSIONER
OF SOCIAL SECURITY — DEFENDANT

****

The Plaintiff, complaining of the Defendant, would respectfully show the Court:

I

That the Plaintiff is a citizen and resident of the United States of America and of the County of Breathitt, Commonwealth of Kentucky, that jurisdiction of this Court is founded as provided by Section 205(g) of the Social Security Act, as amended, Section 405(g), Title 42, United States Code.

II

That an application was filed by the Plaintiff with the Social Security Administration, that said application was filed by the above named Plaintiff to establish for himself a period of disability in accordance with the laws of the United States of America.

That this matter was heard before the Administrative Law Judge who ruled that the Plaintiff was not entitled to a period of disability. That denial decision was timely appealed to the Appeals Council on April 24, 2014 which the Appeals Council improperly dismissed on November 6, 2015.

III

That the Plaintiff further alleges that he suffered due process violations in his claim by having an Administrative Law Judge(ALJ), who has no jurisdiction over his case and who had no participation in the adjudication process issue a denial decision on March 26, 2014. Without any explanation, this ALJ's decision was not only in clear violation of the commissioner's own rules and regulations as set forth under HALLEX I-2-8-40 but constitues a due process violation to the Plaintiff's right to a fair hearing.

IV

Plaintiff has exhausted all of his administrative remedies, a final decision having been rendered by the Commissioner.

IV

That this action is brought before the Court to review in the manner of judicial review for in said Section of said Act, the final decision of the Commissioner holding that the Plaintiff is not entitled to a period of disability pursuant to divisions to Sections 216(i) and 223 of the Act, respectively, as amended.

V

That the determination made by the Defendant, that the Plaintiff was not disabled, was not supported by substantial evidence.

WHEREFORE, the Plaintiff prays that the Court review the findings and determinations of the Defendant and establish for him a period of disability according to the applicable law, and for such other and proper relief as the Court deems just and proper.

/s/ WOLODYMYR CYBRIWSKY
HON. WOLODYMYR CYBRIWSKY
214 SOUTH CENTRAL AVENUE
PRESTONSBURG, KENTUCKY 41653
(606) 886-8389
wolodymycybriwsky@bellsouth.net

This the 5th day of January, 2016.

Declaration of Kathie Hartt (Feb. 19, 2016)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

RICKY LEE SMITH

Plaintiff

vs.

CAROLYN W. COLVIN
ACTING COMMISSIONER OF
SOCIAL SECURITY

Defendant

CIVIL ACTION NO. 5:16-CV-00003

DECLARATION OF KATHIE HARTT
COURT CASE PREPARATION AND REVIEW
BRANCH 3
OFFICE OF DISABILITY ADJUDICATION AND
REVIEW
SOCIAL SECURITY ADMINISTRATION

I, KATHIE HARTT, Chief of Court Case Preparation and Review Branch 3 of the Office of Appellate Operations, Office of Disability Adjudication and Review, Social Security Administration, declare and state as follows:

(1) Under direct delegation from the Commissioner of Social Security, the Office of Disability Adjudication and Review administers a nationwide hearings and appeals program. The Office of Disability Adjudication and Review includes the Appeals Council and Administrative Law Judges who hold hearings on claims arising under Title XVI of the Social Security Act, as amended, when such hearing is duly requested by a claimant who is dissatisfied with the administrative determination of a claim. The Office of Appellate Operations provides professional and technical advice to the Deputy Commissioner and Administrative Appeals Judges of the Appeals Council in the processing of cases in which a civil action has been filed.

(2) One function of the Appeals Council is to act on requests for review of hearing decisions made by Administrative Law Judges and to either grant, deny or dismiss any such request. Under the regulations of the Social Security Administration, if the Appeals Council denies a timely request for review of a hearing decision, that hearing decision becomes the "final decision" within the meaning of, and subject to, the provisions for judicial review in section 205(g) of the Social Security Act, as amended (42 U.S.C. section 405(g)), the first sentence of which reads as follows:

> "Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner may allow. ***"

(3) I am responsible for the processing of claims under Title XVI of the Social Security Act, as

amended, whenever a civil action has been filed in the Commonwealth of Kentucky. The official file maintained by the Office of Disability Adjudication and Review relating to the claim of the plaintiff, RICKY LEE SMITH, under Title XVI of the Social Security Act, is presently within my custody and has been examined under my supervision. To the best of my knowledge and belief said file shows that:

(a) Plaintiff filed an application for Supplemental Security Income on August 7, 2012. The application was initially denied on September 6, 2012. Plaintiff timely filed a request for reconsideration on October 1, 2012. The application was denied again on December 6, 2012. Plaintiff timely filed a request for a hearing before an Administrative Law Judge on December 14, 2012.

(b) On March 26, 2014, the Administrative Law Judge issued an unfavorable hearing decision (Exhibit 1).

(c) On October 1, 2014, Plaintiff faxed to the Social Security Administration an undated request for review form, a brief dated April 24, 2014, and a fax cover sheet dated September 21, 2014 requesting the status of the appeal (Exhibit 2).

(d) On November 6, 2015, the Appeals Council dismissed the request for review for untimely filing (Exhibit 3). The Appeals Council notice did not provide for further appeal.

(e) On January 5, 2016, Plaintiff filed a civil action in the U.S. District Court for the Eastern District of Kentucky.

In accordance with 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

February 19, 2016
Date

/s/ Kathie Hartt
KATHIE HARTT

No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

The Social Security Act provides for judicial review of administrative decisions rejecting benefits claims: "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party," may obtain judicial review of that decision in federal court. 42 U.S.C. § 405(g).

Disability benefit claims are initially heard by an administrative law judge; adverse decisions may be appealed to the Appeals Council. Appeals Council decisions rejecting a claim on the merits are subject to judicial review. But the courts of appeals disagree about whether judicial review is available when the Appeals Council finally rejects a claim on the ground that the claimant's administrative appeal was not timely.

The question presented is:

Whether the Appeals Council's decision to reject a disability claim on the ground that the claimant's appeal was untimely is a "final decision" subject to judicial review under Section 405(g).

TABLE OF CONTENTS

Table of Authorities iii
Opinions Below 1
Jurisdiction 1
Statutory and Regulatory Provisions Involved 1
Statement 3
A. Legal Background 4
B. Factual and Procedural Background 6
Summary of Argument 11
Argument 13
Petitioner Is Entitled To Judicial Review Of The Appeals Council's Decision 13
A. The Appeals Council's Rejection Of The Claim On Untimeliness Grounds Is A "Final Decision" Within The Meaning Of Section 405(g) 13
1. The plain meaning of the term "final decision" encompasses rejection of an appeal on untimeliness grounds 14
2. The presumption favoring judicial review supports reviewability of the Appeals Council's decision 16
3. This Court's decision in Sanders is wholly inapposite 17
4. The agency's regulation cannot override the statutory text 19
5. Practical considerations favor judicial review 20
B. Petitioner Has Satisfied The Other Prerequisites For Judicial Review 23
Conclusion 26

TABLE OF AUTHORITIES

Page(s)

Cases

Bennett v. *Spear*,
520 U.S. 154 (1997) 12, 15

Bloodsworth v. *Heckler*,
703 F.2d 1233 (11th Cir. 1983) 6, 19

Boley v. *Colvin*,
761 F.3d 803 (7th Cir. 2014) 18, 22, 24

Bowen v. *City of New York*,
476 U.S. 467 (1986) 24

Bowen v. *Michigan Acad. of Family Physicians*,
476 U.S. 667 (1986) 4

Brandtner v. *Department of Health & Human Servs.*,
150 F.3d 1306 (10th Cir. 1998) 6

Califano v. *Sanders*,
430 U.S. 99 (1977) 12, 18, 19

Casey v. *Berryhill*,
853 F.3d 322 (7th Cir. 2017) 16

Chevron, U.S.A., Inc. v. *Natural Res. Def. Council, Inc.*,
467 U.S. 837 (1984) 20

Counts v. *Commissioner of Soc. Sec.*,
2010 WL 5174498 (M.D. Fla. 2010) 22, 23

Cuozzo Speed Techs., LLC v. *Lee*,
136 S. Ct. 2131 (2016) 17

Davis v. *Colvin*,
2013 WL 1174157 (M.D. Fla. 2013) 22

Cases—continued

Department of Housing & Urban Dev. v. *Rucker*,
535 U.S. 125 (2002) 14

Epic Sys. Corp. v. *Lewis*,
138 S. Ct. 1612 (2018) 20

Limtiaco v. *Camacho*,
549 U.S. 483 (2007) 14

Lindahl v. *Office of Pers. Mgmt.*,
470 U.S. 768 (1985) 17

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 4, 11, 17

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 24

Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. P'ship*,
507 U.S. 380 (1993) 16

Pizarro v. *Commissioner of Soc. Sec.*,
2013 WL 847331 (M.D. Fla. 2013) 22

Sackett v. *EPA*,
566 U.S. 120 (2012) 15

SEC v. *Chenery Corp.*,
318 U.S. 80 (1943) 25

Sims v. *Apfel*,
530 U.S. 103 (2000) 25

Smith v. *Heckler*,
761 F.2d 516 (8th Cir. 1985) 10, 16

United States Army Corps of Eng'rs v. *Hawkes Co.*,
136 S. Ct. 1807 (2016) 15

Cases—continued

United States v. *Carolina Freight Carriers Corp.*,
315 U.S. 475 (1942) 20

United States v. *Gonzales*,
520 U.S. 1 (1997) 14

United States v. *James*,
478 U.S. 597 (1986) 14

Walker v. *Commissioner of Soc. Sec.*,
2013 WL 3833199 (M.D. Fla. 2013) 22

Statutes and Regulations

20 C.F.R.
§ 404.968 8
§ 416.1404 15
§ 416.1455 15
§ 416.1467 5
§ 416.1468 ..... *passim*
§ 416.1471 ..... 3, 5
§ 416.1472 ..... *passim*
§ 416.1481 ..... 5, 6

5 U.S.C. § 704 15

28 U.S.C.
§ 1254(1) 1
§ 1257 16
§ 1291 16
§ 1331 2
§ 1346 2

42 U.S.C. § 405(g) ..... *passim*

42 U.S.C. § 405(h) 2

Other Authorities

Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199 (1990) 21

The Compact Oxford English Dictionary (2d ed. 1991) 14

David Fahrenthold, *The Biggest Backlog in the Federal Government*, Wash. Post (Oct. 18, 2014) 21

Merriam-Webster's Collegiate Dictionary (10th ed. 1996) 14

Soc. Sec. Admin., *Annual Statistical Supplement, 2017: Table 2.F11* (Mar. 2018) 21

Soc. Sec. Admin., *Annual Statistical Supplement, 2017: Tables 2.F5, 2.F6* (Mar. 2018) 21

Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council* (last visited Dec. 12, 2018) 21

Webster II New College Dictionary (1995) 14

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 813. The orders of the district court (Pet. App. 16a-26a) are unreported.

JURISDICTION

The Sixth Circuit entered its judgment on January 26, 2018. On April 19, Justice Kagan entered an order extending the time for filing a certiorari petition to and including May 25, 2018. The petition was filed on that date, and this Court granted the petition on November 2, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. § 405(g) and (h) provide in relevant part:

> (g) Judicial Review.
>
> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.

(h) Finality of Commissioner's decision.

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

2. Department of Health and Human Services regulations codified in Part 416 of Title 20 of the Code of Federal Regulations state:

416.1468. (a) Time and place to request Appeals Council review. You may request Appeals Council review by filing a written request. You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. You may file your request at one of our offices within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) Extension of time to request review. You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an exten-

sion of time must be in writing. It must be filed with the Appeals Council, and it must give the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

* * *

416.1471. The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended.

416.1472. The dismissal of a request for Appeals Council review is binding and not subject to further review.

STATEMENT

Each year, thousands of individuals whose claims for disability benefits are denied seek review of those denials by the Social Security Administration's Appeals Council but find their appeals rejected on untimeliness grounds. The question in this case is whether a benefits applicant is entitled to judicial review of such determinations under Section 405(g), which states that "any final decision of the Commissioner of Social Security" is subject to judicial review. 42 U.S.C. § 405(g).

The governing regulations provide that Social Security Administration disability benefits decisions are subject to review by an administrative law judge (ALJ). A claimant may obtain review of the ALJ's decision by the agency's Appeals Council by requesting review within 60 days of receipt of the ALJ's ruling,

although that deadline does not apply if the claimant shows good cause for an untimely request.

Appeals Council decisions denying benefits claims on the merits are reviewable in court under Section 405(g). The question in this case is whether an Appeals Council decision rejecting an appeal on untimeliness grounds constitutes a "final decision" reviewable in court.

Such a ruling qualifies for judicial review under the plain language of Section 405(g): it is the "final" administrative ruling in a case—there is no further administrative consideration of the claim. And rejections of claims on untimeliness grounds are routinely reviewed by courts under statutes with similar finality requirements. The presumption favoring judicial review also weighs heavily in favor of review here. Indeed, the Solicitor General refuses to defend the contrary holding below, recognizing that "a decision of the Appeals Council dismissing as untimely a request for review of an ALJ decision after a hearing is a 'final decision' within the meaning of 42 U.S.C. 405(g)." U.S. Cert. Br. 26.

This Court should hold that such decisions are subject to judicial review and remand the case for consideration of the merits of petitioner Smith's challenge to the Appeals Council's ruling.

A. Legal Background.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). This Court therefore applies a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

Title II of the Social Security Act expressly provides for judicial review of all "final decision[s]" of the Commissioner of Social Security. 42 U.S.C. § 405(g). Whether a court has jurisdiction to review a particular decision therefore depends on whether it constitutes a "final decision" by the Commissioner.

The procedure for adjudicating a disputed denial of a Social Security disability benefits claim begins with an initial decision by an administrative law judge (ALJ). If the claimant objects to the ALJ's determination regarding his claim, the claimant may appeal that determination to the Appeals Council. See generally 20 C.F.R. §§ 416.1467 to 416.1482. The deadline for requesting Appeals Council review is 60 days from receipt of notice of the ALJ's decision. *Id.* §§ 404.968, 416.1468. An out-of-time request for review is allowable where the claimant establishes "good cause" for not appealing in a timely manner. *Ibid.*

The regulations provide that "[t]he Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended." 20 C.F.R. § 416.1471. They further state that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." *Id.* § 416.1472.

If a request for Appeals Council review is not dismissed, the Council "may deny a party's request for review or it may decide to review a case and make a decision." 20 C.F.R. § 416.1481. "The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in

Federal district court, or the decision is revised." *Ibid.*

The courts of appeals disagree on whether an Appeals Council dismissal of a request for review on the grounds of untimeliness constitutes a "final decision" under Section 405(g). Compare *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998) ("The dismissal as untimely is not a decision on the merits or a denial of a request for review by the Appeals Council, both of which constitute final decisions and can be reviewed by the federal district court."), with *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983) ("Neither the statute nor the regulations make any distinction in regard to rights of judicial appeal between dismissals and determinations on the merits by the Appeals Council. Both are equally final and both trigger a right to review by the district court.").

B. Factual and Procedural Background.

1. Petitioner Ricky Lee Smith initially applied in September 1987 for supplemental security income based on disability resulting from a tumor on his spine and complications following from the tumor's removal. Pet. App. 3a; J.A. 16.

An ALJ issued a decision in Smith's favor in October 1988, and he received benefits until 2004, when he was found to be ineligible because his financial resources exceeded the permissible limit. Pet. App. 3a.

2. In August 2012, Smith filed a new application for supplemental security income based on the initial finding of disability, as well as additional medical complications resulting from that condition—including chronic back pain, a second recurrence of the spi-

nal tumor, recurrent urinary tract infections from self-catheterization, diverticulitis, hypertension, depression, and anxiety. Pet. App. 3a; J.A. 14, 16-19. The claim was denied, and denied again upon reconsideration. Pet. App. 3a.

Smith timely filed a request for a hearing before an administrative law judge. ALJ Robert Bowling conducted a videoconference on February 18, 2014. Pet. App. 3a. On March 26, 2014, a different ALJ, Don Paris, signed a decision on behalf of ALJ Bowling denying Smith's claim. *Ibid.*; J.A. 8-23.

The ALJ found that Smith had not worked since the 1980s. J.A. 14. He further found that Smith "has the following medically determinable impairments: disorders of the spine, urinary tract infections, diverticulitis, hypertension, depression, and anxiety." *Ibid.*

Next, the ALJ determined that Smith's "medically determinable impairments could reasonably be expected to produce the alleged symptoms"—including back pain, reduced range of motion, nausea, hypertension, digestive problems, and depression. J.A. 19; see also *id.* at 15-19.

He concluded, however, that Smith's "physical and mental impairments, considered singly and in combination, do not significantly limit the claimant's ability to perform basic work activities. Thus, the claimant does not have a severe impairment or combination of impairments." J.A. 23; see also *id.* at 19-23. For that reason, the ALJ concluded that Smith is not disabled and denied his application for benefits. *Id.* at 23.

3. Smith's counsel represented to the Appeals Council and the district court that he mailed to the

Appeals Council on April 24, 2014, a written request for review of ALJ Paris's decision—within the 60-day period for filing an appeal. Pet. App. 3a; 20 C.F.R. §§ 404.968, 416.1468; see also J.A. 24-29 (letter requesting Appeals Council review).

The review request challenged the ALJ decision on the grounds that it was signed by an ALJ who had not heard the evidence and therefore could not properly make the credibility determinations on which the decision rested; that the signing of the opinion by a different ALJ violated the governing rules; that the Social Security Administration and the ALJ had unlawfully overridden the prior determination of disability (and not properly considered the evidence underlying that prior determination); and that the ALJ's decision was not supported by substantial evidence. J.A. 24-29.

Smith's counsel sent a fax to the Social Security Administration dated September 21, 2014, asking about the status of Smith's appeal. Pet. App. 3a. He attached a copy of his written request to appeal, dated April 24, 2014. *Ibid.*; see J.A. 30-37 (copy of fax and enclosures).

A Social Security Administration representative responded in a letter dated October 1, 2014, stating that the April 2014 appeal request "that you stated was mailed to the [Appeals Council] had not been placed in the electronic folder. If the [Appeals Council] had received it, they would have mailed you a receipt." J.A. 38-39. The representative further stated that he had completed a form and submitted it to the Appeals Council, together with the April letter and September fax: "[t]herefore, the status of your [Ap-

peals Council] request is that it is only being filed today, 10/01/14." *Ibid.*

A Social Security Administration representative submitted to the district court a declaration regarding the contents of the official file. J.A. 48-51. It stated that, "[o]n October 1, 2014, [Smith] faxed to the Social Security Administration an undated request for review form, a brief dated April 24, 2014, and a fax cover sheet dated September 21, 2014 requesting the status of the appeal." *Id.* at 50. Smith's counsel represented below that the appeal request had been mailed on April 24, 2014, within the filing deadline, and that the fax had been sent on September 24. Pet. App. 4a & n.1; Dist. Ct. Dkt. No. 9, at 1-2.

On November 6, 2015, the Appeals Council dismissed the request for review as untimely, finding that Smith had not provided evidence indicating that the appeal request was timely filed and, "therefore, * * * no good cause to extend the time for filing." J.A. 41-42.

4. Smith then commenced this action in the United States District Court for the Eastern District of Kentucky, seeking judicial review of the Appeals Council's decision under 42 U.S.C. § 405(g). Smith asserted that the Appeals Council had improperly dismissed his request for review.

The district court dismissed the complaint. Pet. App. 22a-26a. It held that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim." *Id.* at 25a. The court rejected Smith's constitutional claims, holding that due process was not violated by the Ap-

peals Council's dismissal of his claim as untimely or by the signing of the ALJ decision by an ALJ who did not preside over his evidentiary hearing. *Id.* at 25a-26a.[1]

5. The court of appeals affirmed. Pet. App. 1a-15a. It held that the Appeals Council's dismissal of Smith's untimely request for review was not a "final decision" subject to judicial review under Section 405(g). *Id.* at 8a. The court observed that the "majority view is that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute 'final decisions' reviewable by district courts." *Id.* at 7a. It found "compelling" the Eighth Circuit's conclusion that Appeals Council dismissals for untimeliness "'do[] not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review.'" *Ibid.* (quoting *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985)).

The court further concluded that Smith had not "established a 'colorable constitutional claim,'" which in the court's view would have provided grounds for overturning the Appeals Council's decision notwithstanding the court's holding that review was not available under Section 405(g). Pet. App. 8a. It rejected Smith's due process argument based on his contention that the request for Appeals Council review was timely filed (*id.* at 9a-13a); his contention that the signing of the decision by an ALJ who did

---

[1] The district court subsequently denied Smith's motion under Federal Rule of Civil Procedure 59(e) to alter or amend the judgment. Pet. App. 16a-21a.

not preside over the hearing violated due process (*id.* at 13a-14a); and his contention that due process was violated by the manner in which the ALJ considered the 1988 disability decision (*id.* at 14a).

SUMMARY OF ARGUMENT

Federal law embodies a general rule that decisions of federal administrative agencies that finally decide the issue before the agency and adversely affect private parties are subject to judicial review. That principle is incorporated in the Administrative Procedure Act and reflected in numerous judicial review provisions contained in individual federal statutes.

Judicial review of agency action serves the important purposes of invalidating arbitrary agency decision-making as well as administrative determinations not rooted in the facts before the agency decision-maker. It also precludes unlawful and unconstitutional agency action. And the possibility of judicial review provides a strong incentive for agencies to conform their decisions to the governing legal standards. Given these important benefits, it is not surprising that "this Court applies a 'strong presumption' favoring judicial of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015).

Against this background, Section 405(g) plainly provides for judicial review of Appeals Council decisions holding that a claimant's request for Appeals Council review was untimely and not excused by good cause.

The statute provides for judicial review of "any final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). The Appeals Council decision is binding on petitioner and

also plainly is "final"—it is the last step in the administrative decision-making process. That is all that is required to satisfy the statute's finality requirement.

Indeed, this Court has repeatedly held that a decision is "final" within the meaning of the Administrative Procedure Act when it marks the consummation of the agency's decision-making process and determines rights and obligations of private parties. *E.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). The decision here plainly satisfies that standard.

The court below rested its conclusion that the Appeals Council decision is unreviewable principally on the observation that the ruling does not address the merits of petitioner Smith's claim. But that rationale is impossible to square with the statute's authorization of judicial review of "*any* final decision." 42 U.S.C. § 405(g) (emphasis added). And procedural decisions of agencies—and lower courts—are routinely reviewed under statutes requiring a "final" determination.

Neither does this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), support, much less compel, the preclusion of judicial review here. That case involved a procedural device—reopening of a prior final decision—that would have given the benefits claimant a second opportunity to obtain judicial review. Petitioner Smith seeks an initial chance for court review of the Appeals Council's decision.

The Court should affirm the reviewability of the Appeals Council's decision and remand the case for further proceedings.

ARGUMENT

Petitioner Is Entitled To Judicial Review Of The Appeals Council's Decision.

Section 405(g) provides in relevant part that "[a]ny individual, *after any final decision of the Commissioner of Social Security made after a hearing* to which he was a party, * * * may obtain a review of such decision by a civil action." 42 U.S.C. § 405(g) (emphasis added).

The Appeals Council's decision here was the final administrative decision with respect to petitioner Smith's benefits claim. And it was preceded by a hearing before an administrative law judge. The Appeals Council's ruling is therefore subject to judicial review under Section 405(g).

A. The Appeals Council's Rejection Of The Claim On Untimeliness Grounds Is A "Final Decision" Within The Meaning Of Section 405(g).

An Appeals Council decision rejecting a case on untimeliness grounds plainly qualifies as a "final decision" within the meaning of Section 405(g). It falls within the plain meaning of that term, and decisions on untimeliness grounds are routinely subject to review under other statutes limiting judicial scrutiny to "final" decisions. The strong presumption favoring judicial review also weighs heavily in favor of that result. Finally, the arguments advanced by the lower courts that have precluded review do not withstand scrutiny.

1. The plain meaning of the term "final decision" encompasses rejection of an appeal on untimeliness grounds.

The starting point for resolving any question of statutory interpretation is the relevant text. *E.g.*, *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). The key text here—the phrase "final decision"—is not defined in the statute, but its plain meaning clearly encompasses Appeals Council decisions denying an appeal on untimeliness grounds.

"Final" means "[c]oming at the end"; "[m]arking the last stage of a process." *The Compact Oxford English Dictionary* 590 (2d ed. 1991); see also *Merriam-Webster's Collegiate Dictionary* 436 (10th ed. 1996) ("coming at the end: being the last in a series"); *Webster II New College Dictionary* 419 (1995) ("[f]orming or occurring at the end"; "[o]f, relating to, or constituting the last element in a series, process, or procedure").

Moreover, the words "final decision" in Section 405(g) do not appear alone; they are preceded by the modifier "any." Congress's inclusion of that broadening term "undercuts a narrow construction" of the statute. *United States* v. *James*, 478 U.S. 597, 605 (1986); accord *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002) ("'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)).

The Appeals Council decision here is "binding and not subject to further review." 20 C.F.R. § 416.1472. Indeed, the governing regulations make clear that an Appeals Council ruling is the last step in the administrative review process applicable to

disability claims. See generally 20 C.F.R. § 416.1404 to 416.1482.

The Appeals Council's decision therefore satisfies the statute's "final decision" requirement.

That conclusion is confirmed by this Court's interpretation of the term "final" in a closely related statute, the Administrative Procedure Act. That law states in pertinent part that "*final agency action* for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704 (emphasis added).

The Court has long held that an agency action is "final" under Section 704 when it marks the "'consummation' of the agency's decision making process," and under which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett*, 520 U.S. at 178; accord *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (applying *Bennett* test); *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012) (same).

The Appeals Council's dismissal of Smith's claim clearly satisfies that test.

To begin with, the ruling is not a "tentative recommendation," *Bennett*, 520 U.S. at 178, but rather—as explained above—the last available step in the administrative review process. There is no further administrative consideration of a disability claim dismissed on untimeliness grounds.

And the Appeals Council's ruling indisputably has legal consequences, because it finalizes the ALJ's denial of a benefit claim. See 20 C.F.R. § 416.1455 (ALJ's decision is "binding" if not reviewed by the Appeals Council); J.A. 42 (Appeals Council decision in this case stating that "[t]he Administrative Law

Judge's decision stands as the final decision of the Commissioner").

The court below and other lower courts holding that Appeals Council untimeliness decisions are not subject to judicial review have asserted that because those rulings "do[] not address the merits of the claim," they "cannot be considered appealable." Pet. App. 7a (quoting *Smith*, 761 F.2d at 518).

But that distinction is entirely irrelevant: nothing in the word "final" distinguishes between dispositions based on the merits and dispositions on other grounds. *Casey* v. *Berryhill*, 853 F.3d 322, 326 n.1 (7th Cir. 2017) (Section 405(g) "'allows judicial review when a claim has been presented and finally decided,' even when that final decision is (or purports to be) a dismissal for untimeliness") (citation omitted). That is particularly true when, as here, the term "final decision" is preceded by the word "any."

Indeed, the statutes authorizing appellate review of "final" court decisions do not distinguish between rulings based on the merits or procedural defaults. *E.g.*, 28 U.S.C. §§ 1257, 1291; *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) (involving question whether failure to comply with deadline resulted from excusable neglect). And neither does the Administrative Procedure Act.[2] There accordingly is no basis for such a distinction here.

2. *The presumption favoring judicial review supports reviewability of the Appeals Council's decision.*

This Court has long recognized that "Congress rarely intends to prevent courts from enforcing its

---

[2] See U.S. Cert. Br. 21 & n.6.

directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining*, 135 S. Ct. at 1651. While the "presumption is rebuttable," the agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review." *Ibid.*

Indeed, judicial review is available even where a statute "plausibly can be read as imposing an absolute bar to judicial review." *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 779 (1985). "[I]f a provision can reasonably be read to permit judicial review, it should be." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part) (summarizing the case law). Judicial review "enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not 'undercut,' Congress's objectives." *Id.* at 2151.

Given this presumption, even if the term "final decision" were not clear—which it is—Section 405(g) should be interpreted to encompass Appeals Council decisions on untimeliness grounds. The provision certainly can be "plausibly" interpreted to include Appeals Council untimeliness rulings, and that is all that is required to hold that judicial review is available.

3. This Court's decision in Sanders *is wholly inapposite*

The court below rested its holding in part on the Court's decision in *Califano* v. *Sanders*. Pet. App. 5a-7a. But *Sanders* is wholly inapposite.

The claimant there had filed a claim for disability benefits and proceeded through all of the steps of

administrative review. *Sanders*, 430 U.S. at 102. The claimant then did not seek judicial review of the Secretary's final decision. *Ibid.* Almost *seven years* later, the claimant filed a second claim alleging the same bases for eligibility, and an ALJ denied reopening of the case and dismissed the claim. *Id.* at 102-103.

This Court determined that the federal courts lacked jurisdiction to consider a request "to reopen a claim of benefits" after the claim had been previously rejected. *Sanders*, 430 U.S. at 107-108. It held that the Social Security Act "clearly limits judicial review to a particular type of agency action, a 'final decision of the Secretary made after a hearing.' But a petition to reopen a prior final decision may be denied without a hearing." *Id.* at 108.

The denial of review here does not involve a second bite at the apple seven years after being afforded—and not utilizing—the opportunity to obtain judicial review. It involves Smith's first opportunity for judicial review, and for that reason *Sanders*' rationale does not apply. See *Boley* v. *Colvin*, 761 F.3d 803, 807 (7th Cir. 2014) (explaining that *Sanders* held that "one opportunity for judicial review is enough" and refusing to extend *Sanders* to preclude judicial review of administrative untimeliness decisions).

As the Eleventh Circuit has explained, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983). Reopening offers the claimant a "bonus opportunity" for obtaining administrative reconsideration of a final decision,

but the Appeals Council determination to dismiss a case as untimely is the first "final decision" on the claim, and therefore the first opportunity to obtain judicial review—*Sanders*' concern about multiple opportunities for judicial review therefore does not apply. *Id.* at 1238.

The court of appeals also cited *Sanders*' reference to the frustration of the statute's 60-day limitation on judicial review of the Commissioner's decision. Pet. App. 6a. Permitting review of Appeals Council dismissals for untimeliness, however, retains the 60-day period for seeking judicial review; it simply acknowledges that the "final decision" occurred when the Appeals Council dismissed the claim.

Indeed, this Court explained that "Congress' determination * * * to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall *repetitive* or belated litigation of stale eligibility claims." *Sanders*, 430 U.S. at 108 (emphasis added). Judicial review of Smith's claim does not enable repetitive litigation: this is his first opportunity to obtain judicial review of the agency's decision.

4. The agency's regulation cannot override the statutory text.

A Social Security Administration regulation provides that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. § 416.1472. However, as the Solicitor General recognizes (U.S. Cert. Br. 21-23), that regulation cannot override Congress's determination—embodied in the statutory text—that judicial review is available for "any final decision."

Here, there simply is no ambiguity permitting deference to an agency interpretation. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) ("deference is not due" under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), unless a court "is left with an unresolved ambiguity" after applying the relevant canons of statutory construction). And even if the text were less clear, the canon of statutory construction establishing a presumption in favor of judicial review provides another basis for upholding the construction supported by the plain text.

5. Practical considerations favor judicial review.

Judicial review of administrative agency decisions provides critically important protections against arbitrary, irrational, and unlawful administrative actions. Congress provides for judicial review "as an additional assurance that its policies" will be executed properly. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942).

That purpose is especially important in the context of disability benefits decisions, given the importance of these benefits to the lives of the statute's beneficiaries and the large number of Americans affected.

The Social Security Administration received more than two million claims for supplemental security income in fiscal year 2016 and a similar number of claims for disability payments. Soc. Sec. Admin., *Annual Statistical Supplement, 2017: Tables 2.F5, 2.F6* (Mar. 2018), perma.cc/4Y8G-NRML.

The Appeals Council disposed of 159,000 requests for review during that same period. Soc. Sec.

Admin., *Annual Statistical Supplement, 2017: Table 2.F11* (Mar. 2018), perma.cc/76YK-JWDM. Approximately one hundred judges and officers decide these cases. See Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council* (last visited Dec. 12, 2018), perma.cc/Z9NE-BBXS. And the government represents that approximately 2,500 cases were dismissed on untimeliness grounds in fiscal year 2017. U.S. Br. 29.

Prior studies have documented the heavy administrative workload borne by Appeals Council personnel. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 257 (1990) (reporting that Appeals Council members could spend only ten to fifteen minutes reviewing an average case); David Fahrenthold, *The Biggest Backlog in the Federal Government*, Wash. Post (Oct. 18, 2014), perma.cc/NQ7S-F48F.

Given these realities, judicial review is especially critical to protect Americans against arbitrary and unjustified agency action. That is true both with respect to the determination regarding the timeliness of the filing of an appeal and the decision whether good cause exists to excuse an untimely filing. See 20 C.F.R. § 416.1468(b) (explaining that the deadline may be extended upon a showing of good cause). Indeed, as the Seventh Circuit recently observed in a closely related context, "[a] court ought not assume that good cause is missing, and that judicial review would frustrate the regulation, when the existence of good cause is the very issue the claimant seeks to present. A district court's decision that good cause

for an extension exists (or doesn't) is subject to appellate review." *Boley*, 761 F.3d at 807.

Significantly, courts in the Eleventh Circuit—the one court of appeals that historically has permitted judicial review of Appeals Council determinations in these circumstances—do find that the Appeals Council was unjustified in dismissing a claim. See, *e.g.*, *Davis* v. *Colvin*, 2013 WL 1174157, at *6, 8 (M.D. Fla. 2013) (holding that the Appeals Council's dismissal on grounds of untimeliness was unfounded); *Counts* v. *Commissioner of Soc. Sec.*, 2010 WL 5174498, at *10 (M.D. Fla. 2010) (holding that a dismissal was "not based on substantial evidence"); *Walker* v. *Commissioner of Soc. Sec.*, 2013 WL 3833199, at *7-8 (M.D. Fla. 2013) (reversing the decision of the Appeals Council when it incorrectly failed to consider new evidence); *Pizarro* v. *Commissioner of Soc. Sec.*, 2013 WL 847331, at *4 (M.D. Fla. 2013) (upholding a magistrate judge's conclusion that a dismissal was not based on substantial evidence).

Here, petitioner has a strong argument that his appeal was timely or, alternatively, that he should have been granted an extension.

Smith's lawyer represented to the Appeals Council and to the district court that he had filed a timely appeal. Concerned about the absence of any communications from the Appeals Council, Smith's counsel provided a copy of his April 24, 2014 appeal, along with a statement affirming that the appeal had been mailed to the Appeals Council on that date. J.A. 30-37; Pet. App. 4a & n.1.

These facts present precisely the sort of agency error that courts within the Eleventh Circuit review

and correct in order to protect deserving claimants. See, *e.g.*, *Counts*, 2010 WL 5174498, at *10 (holding that the Appeals Council's decision to dismiss on the ground of untimeliness was not based on substantial evidence because the agency failed to provide any evidence indicating that the written notice of the reconsideration determination was actually mailed to the claimant).

Certainly the statute entitles petitioner to judicial review of the Appeals Council's determination of untimeliness and lack of good cause.

B. Petitioner Has Satisfied The Other Prerequisites For Judicial Review.

Section 405(g) provides that an individual may obtain judicial review of "any final decision of the Commissioner of Social Security *made after a hearing to which he was a party*." 42 U.S.C. § 405(g) (emphasis added). There is no question that the hearing requirement was satisfied here: an ALJ conducted a hearing on petitioner Smith's benefits claim. See page 7, *supra*.

Notwithstanding the Solicitor General's references to the "hearing" requirement (*e.g.*, U.S. Cert. Br. 16, 17), moreover, a hearing and decision by an ALJ is not always required to enable an individual to obtain judicial review. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court stated that the prerequisites set forth in Section 405(g) "consist[] of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case." *Id.* at 329.

The waivable element "is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the

requirement that a claim for benefits shall have been presented to the Secretary." *Mathews*, 424 U.S. at 329. While "[o]rdinarily, the Secretary has discretion to decide when to waive the exhaustion requirement," as this Court "held in *Eldridge*, 'cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986).

Moreover, the statutory reference to a hearing does not necessarily require a live evidentiary proceeding before an ALJ. As the Seventh Circuit held in determining that an ALJ's decision to dispense with a hearing did not preclude judicial review, "'hearing' means whatever process the Social Security Administration deems adequate to produce a final decision." *Boley*, 761 F.3d at 805.

Finally, the Solicitor General states that if a court determines that the Appeals Council erred—either in concluding that an appeal was not timely filed or in finding no good cause to excuse an untimely filing—the court may not address the merits of the benefit denial but is obligated to remand the case to the agency. See U.S. Cert. Br. 24-25. That question is not presented here, and there is no occasion for the Court to address it, but the government's position is not consistent with the Court's decisions in this area, for two reasons.

First, the Court held in *Sims* v. *Apfel*, 530 U.S. 103 (2000), that a claimant may obtain judicial review regarding an issue even if he did not raise the issue in his Appeals Council appeal. "Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals

Council in order to preserve judicial review of those issues." *Id.* at 112.

Sims thus holds that a court may address an issue in the absence of an Appeals Council determination regarding—or even Appeals Council consideration of—the issue. A court rejecting an Appeals Council untimeliness determination therefore could address the merits of an issue that the claimant did not raise before the Appeals Council.

It would be bizarre to hold that Section 405(g) requires a remand to the Appeals Council simply because the claimant chose to raise the issue before that body. A court could, of course, conclude that its consideration would be aided by the Council's determination, and remand on that basis, but it is not required to do so.[3]

Second, in some circumstances—as discussed above—the exhaustion requirement can be waived, or must be deemed waived. When those circumstances are present, they would provide an additional reason why a remand to the Appeals Council would not be required.

---

[3] The Solicitor General cites (U.S. Cert. Br. 24) *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). But that decision rested on the importance of safeguarding an agency's prerogatives: "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. * * * [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.* at 88. By holding that a court may address issues not addressed by the Appeals Council, *Sims* determined that these policy determinations are not entrusted to the Appeals Council "alone," and *Chenery*'s rationale therefore does not apply.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus
@mayerbrown.com

Counsel for Petitioner

* The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
SARAH CARROLL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide various monetary benefits to certain eligible individuals. The Act directs the Commissioner of Social Security to adjudicate applications for benefits, and it authorizes judicial review of "any final decision of the Commissioner of Social Security made after a hearing to which [the claimant] was a party." 42 U.S.C. 405(g); see 42 U.S.C. 1383(c)(3). Petitioner filed an application for supplemental-security-income benefits under Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, and an administrative law judge (ALJ) denied petitioner's claim after a hearing. Petitioner filed a request for review of the ALJ's decision with SSA's Appeals Council. The Appeals Council dismissed petitioner's request for review, finding that it was untimely under an SSA regulation and that petitioner had not shown good cause for missing the deadline. See 20 C.F.R. 416.1468. SSA's regulations provide that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review," 20 C.F.R. 416.1472, and that in such circumstances the ALJ's decision "is binding on all parties," 20 C.F.R. 416.1455. The question presented is:

Whether a decision of the Appeals Council dismissing as untimely a request for review of a decision issued by an ALJ after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. 405(g).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory and regulatory provisions involved 2
Statement:
A. Statutory and regulatory background 2
1. Statutory framework 2
2. SSA administrative-review process 4
a. Initial determination and reconsideration 5
b. ALJ hearing and decision 6
c. Appeals Council review 8
B. Proceedings in this case 10
Summary of argument 17
Argument:
A Social Security Appeals Council order dismissing a request for review as untimely is judicially reviewable under 42 U.S.C. 405(g) 21
A. Section 405(g) authorizes judicial review of the Appeals Council's conclusion that a claimant failed to exhaust administrative remedies 23
B. The court of appeals' reasons for refusing judicial review are not persuasive 32
Conclusion 46
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Adams v. *Heckler*, 799 F.2d 131 (4th Cir. 1986) 16
Athens Cmty. Hosp., Inc. v. *Schweiker*, 686 F.2d 989 (D.C. Cir. 1982), modified on reh'g, 743 F.2d 1 (D.C. Cir. 1984) 31

Cases—Continued: Page

Auburn Reg'l Med. Ctr. v. *Sebelius*, 642 F.3d 1145 (D.C. Cir. 2011), rev'd on other grounds, 568 U.S. 145 (2013) 31, 33
Bacon v. *Sullivan*, 969 F.2d 1517 (3d Cir. 1992) 16, 33
Bennett v. *Spear*, 520 U.S. 154 (1997) 26, 27
Bloodsworth v. *Heckler*, 703 F.2d 1233 (11th Cir. 1983) ..... *passim*
Boley v. *Colvin*, 761 F.3d 803 (7th Cir. 2014) 37, 39, 45
Bowen v. *City of New York*, 476 U.S. 467 (1986) 5, 23, 34, 44
Bowen v. *Galbreath*, 485 U.S. 74 (1988) 2
Bowen v. *Yuckert*, 482 U.S. 137 (1987) 41
Brandtner v. *Department of Health & Human Servs.*, 150 F.3d 1306 (10th Cir. 1998) 16, 33
Califano v. *Sanders*, 430 U.S. 99 (1977) ..... *passim*
Callender v. *SSA*, 275 Fed. Appx. 174 (3d Cir. 2008) 45
Casey v. *Berryhill*, 853 F.3d 322 (7th Cir. 2017) 16, 22, 30
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 27
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 44
Cox v. *Benefits Review Bd.*, 791 F.2d 445 (6th Cir. 1986) 31
Dexter v. *Colvin*, 731 F.3d 977 (9th Cir. 2013) 45
Dickinson v. *Zurko*, 527 U.S. 150 (1999) 44
Dietsch v. *Schweiker*, 700 F.2d 865 (2d Cir. 1983) 16, 33
Dillow v. *Sullivan*, 952 F.2d 1396, 1992 WL 6810, (4th Cir. Dec. 5, 1992) 33
Farzana K. v. *Indiana Dep't of Educ.*, 473 F.3d 703 (7th Cir. 2007) 31

Cases—Continued: Page

Harper ex rel. Harper v. *Bowen*, 813 F.2d 737 (5th Cir.), cert. denied, 484 U.S. 969 (1987) 16, 33
Higgs v. *Attorney Gen. of the U.S.*, 655 F.3d 333 (3d Cir. 2011) 31
Hilmes v. *Secretary of Health & Human Servs.*, 983 F.2d 67 (6th Cir. 1993) 15, 37
ICC v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987) 27
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 44
Khan v. *U.S. Dep't of Justice*, 494 F.3d 255 (2d Cir. 2007) 31
Loya v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279 (9th Cir. 1983) 31
Loyd v. *Sullivan*, 882 F.2d 218 (7th Cir. 1989) 44
Magwood v. *Patterson*, 561 U.S. 320 (2010) 25
Mathews v. *Eldridge*, 424 U.S. 319 (1976) ..... *passim*
Matlock v. *Sullivan*, 908 F.2d 492 (9th Cir. 1990) 16, 33, 35, 38, 40
Port of Boston Marine Terminal Ass'n v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) 27
Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 25
Richardson v. *Perales*, 402 U.S. 389 (1971) 43
Rothman v. *Secretary of Health & Human Servs.*, 70 F.3d 110, 1994 WL 866086 (1st Cir. Dec. 8, 1994) 32
Sackett v. *EPA*, 566 U.S. 120 (2012) 27
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 19, 29
Shalala v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) 24
Sheehan v. *Secretary of Health, Educ. & Welfare*, 593 F.2d 323 (8th Cir. 1979) 21

Cases—Continued: Page

Sims v. *Apfel*, 530 U.S. 103 (2000) 4, 25, 34
Smith v. *Heckler*, 761 F.2d 516 (8th Cir. 1985) 16, 17, 33, 38, 39, 42
Taniguchi v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012) 25
Weinberger v. *Salfi*, 422 U.S. 749 (1975) ..... *passim*

Constitution, statutes, regulations, and rule:

U.S. Const. Amend. V (Due Process Clause) 14
Administrative Procedure Act, ch. 324, 60 Stat. 237 (5 U.S.C. 551 *et seq.*, 701 *et seq.*) 26, 27
5 U.S.C. 704 26
Social Security Act, 42 U.S.C. 301 *et seq.* 2
Title II, 42 U.S.C. 401 *et seq.* 2, 3, 4
42 U.S.C. 405(a) 4, 20, 29, 40, 41, 1a
42 U.S.C. 405(b)(1) 2, 4, 6, 19, 35, 41, 1a
42 U.S.C. 405(g) (Supp. V 1939) 27
42 U.S.C. 405(g) ..... *passim*
42 U.S.C. 405(h) 3, 36, 6a
Title XVI, 42 U.S.C. 1381 *et seq.* 2, 3, 4, 10, 12
42 U.S.C. 1383(c)(1)(A) 2, 4, 6, 19, 35, 7a
42 U.S.C. 1383(c)(3) 3, 9, 18, 23, 32, 9a
42 U.S.C. 1383(d)(1) 4
Social Security Act Amendments of 1939, ch. 666, Tit. II, sec. 201, § 205(g), 53 Stat. 1370-1371 27
28 U.S.C. 1291 ..... 31, 32
20 C.F.R.:
Section 404.900 *et seq.* 4
Section 404.952(e) (1961) 9
Section 416.1400 ..... 4, 10a

Regulations and rule—Continued: Page

Section 416.1400(a)(1)-(4) 5, 10a
Section 416.1400(a)(1) 5, 10a
Section 416.1400(a)(2) 5, 10a
Section 416.1400(a)(3) 6, 10a
Section 416.1400(a)(4)-(5) 34, 39, 10a
Section 416.1400(a)(4) 8, 39, 10a
Section 416.1400(a)(5) 5, 8, 9, 15, 40, 10a
Section 416.1400(b) 5, 10a
Section 416.1401 7
Section 416.1402 5
Section 416.1403(a)(8) 7, 8, 9, 40, 12a
Section 416.1404(a) 5
Section 416.1405 ..... 6, 12a
Section 416.1409 ..... 5, 12a
Section 416.1411 ..... 5, 6, 8, 13a
Section 416.1413-416.1422 6
Section 416.1417(a) 6
Section 416.1417(b) 6
Section 416.1417(d) 8
Section 416.1421 ..... 8, 15a
Section 416.1423-416.1428 10
Section 416.1424(a) 10
Section 416.1424(d) 10
Section 416.1425(a) 10
Section 416.1429-416.1435 6
Section 416.1433(b) 6, 16a
Section 416.1433(c) 6, 16a
Section 416.1436 6
Section 416.1446 6
Section 416.1448 6
Section 416.1448(b)(i) 36

Regulations and rule—Continued: Page

Section 416.1449-416.1452 6
Section 416.1453(a) 6
Section 416.1453(d) 6
Section 416.1455 ..... 7, 9, 24, 27, 16a
Section 416.1457 ..... 7, 17a
Section 416.1457(c)(3) 7, 18a
Section 416.1459 ..... 7, 8, 19a
Section 416.1460(a) 7, 20a
Section 416.1467-416.1481 ..... 8, 21a
Section 416.1467 ..... 8, 21a
Section 416.1468 ..... 8, 11, 18, 28, 21a
Section 416.1468(a) 29, 21a
Section 416.1469 8
Section 416.1470 (2014) 8
Section 416.1470 (2018) 8
Section 416.1471 ..... 9, 12, 15, 40, 22a
Section 416.1472 ..... *passim*, 23a
Section 416.1479-1482 9
Section 416.1479 8
Section 416.1481 ..... 8, 9, 23a
Section 416.1487 ..... 10, 33
Section 416.1488-416.1489 10
Fed. R. Civ. P. 59(e) 15

Miscellaneous:

25 Fed. Reg. 1677 (Feb. 26, 1960) 9
45 Fed. Reg. 52,078 (Aug. 5, 1980) 9
64 Fed. Reg. 57,687 (Oct. 26, 1999) 9, 40
81 Fed. Reg. 14,438 (Mar. 14, 2016) 7, 8
Webster's New International Dictionary of the English Language (2d ed. 1949) 26

Miscellaneous—Continued: Page

SSA, *Annual Performance Report Fiscal Years 2017–2019* (Feb. 12, 2018), https://www.ssa.gov/budget/FY19Files/2019APR.pdf 43

In the Supreme Court of the United States

No. 17-1606

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 813. The orders of the district court granting respondent's motion to dismiss (Pet. App. 22a-26a) and denying petitioner's subsequent motion for relief under Federal Rule of Civil Procedure 59(e) (Pet. App. 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. On April 19, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 25, 2018, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 2, 2018. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-24a.

STATEMENT

A. Statutory And Regulatory Background

1. *Statutory framework.* The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain eligible individuals under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental-security-income benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75.

When benefits are sought under either program, the Act "direct[s]" the Commissioner of Social Security "to make findings of fact, and decisions as to the right of any individual applying for a payment." 42 U.S.C. 405(b)(1); see 42 U.S.C. 1383(c)(1)(A). The Act establishes certain minimum requirements that the Commissioner must observe in adjudicating applications for benefits. For example, in cases involving an application for disability benefits, if the Commissioner renders a decision adverse to the claimant on the question of disability, the decision must contain a statement of the case, in understandable language, setting forth a discussion of the evidence and stating the Commissioner's

determination and the reasons upon which it is based. See *ibid.* The Commissioner must also provide the claimant notice and an opportunity for a hearing to review an adverse decision. See *ibid.*

The Act provides that a final decision of the agency made after a hearing is subject to judicial review. 42 U.S.C. 405(g). Specifically, Section 405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action" in federal district court "commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." *Ibid.* (Title II proceedings); see 42 U.S.C. 1383(c)(3) (The Commissioner's "final determination[s]" regarding supplemental-security-income benefits under Title XVI shall be "subject to judicial review as provided in section 405(g) of [Title 42] to the same extent as the Commissioner's final determinations under section 405."). That provision for judicial review is exclusive: "The findings and decision of the Commissioner of Social Security after a hearing" are "binding upon all individuals who were parties to such hearing" and may not be reviewed except as provided in the Act. 42 U.S.C. 405(h). The Act also provides that, in the course of judicial review, "[t]he findings of the Commissioner * * * as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. 405(g).

Subject to those and other requirements established by the Act itself, the Act grants SSA broad discretion to shape administrative procedures for adjudicating benefits applications under Titles II and XVI. The Act au-

thorizes the Commissioner "to make rules and regulations and to establish procedures, not inconsistent with the provisions of [Titles II and XVI of the Act], which are necessary or appropriate to carry out" the Act's provisions. 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1). The Commissioner is "further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper." 42 U.S.C. 405(b)(1), 1383(c)(1)(A). In cases in which the Commissioner, after a hearing, renders a decision adverse to the claimant "because of failure of the claimant * * * to submit proof in conformity with any regulation prescribed under" Section 405(a), the Act limits a district court's review to "only the question of conformity with such regulations and the validity of such regulations." 42 U.S.C. 405(g).

2. *SSA administrative-review process.* Exercising the authority conferred by Section 405(a), the Commissioner has established a multi-step administrative process through which SSA adjudicates claims for benefits. See 20 C.F.R. 416.1400.[1] The claims process begins with an "initial determination," which may be followed by "reconsideration," a hearing before an administrative

---

[1] Because this case involves supplemental-security-income benefits under Title XVI, this brief cites the regulatory provisions applicable to Title XVI cases. Parallel provisions exist for Title II benefits. See generally 20 C.F.R. 404.900 *et seq.* See also *Sims* v. *Apfel*, 530 U.S. 103, 107 n.2 (2000) (noting that the regulations governing Titles II and XVI are "not materially different"). During the pendency of petitioner's claim for benefits and this litigation, the regulations have been modified in various respects not relevant to the issues presented in this proceeding. For simplicity and consistency, this brief refers to the regulatory provisions currently in force unless indicated otherwise.

law judge (ALJ), and review by the SSA Appeals Council (a body within SSA that reviews ALJ decisions). 20 C.F.R. 416.1400(a)(1)-(4); see *Bowen* v. *City of New York*, 476 U.S. 467, 471-472 (1986). SSA's final decision is then subject to judicial review in federal district court. 20 C.F.R. 416.1400(a)(5); see *City of New York*, 476 U.S. at 472. At each step of the process, SSA's determination or decision generally becomes binding on the claimant unless he timely pursues further review in accordance with SSA's regulations. 20 C.F.R. 416.1400(b) (if a claimant "do[es] not take the next step [in the administrative-review process] within the stated time period," the claimant "will lose [the] right to further administrative review and [the] right to judicial review," unless good cause exists); see *City of New York*, 476 U.S. at 472.

a. *Initial determination and reconsideration.* A person who applies for benefits first receives an initial determination, based on the preponderance of the evidence, that "states[s] the important facts and give[s] the reasons for [SSA's] conclusions." 20 C.F.R. 416.1402; see 20 C.F.R. 416.1400(a)(1), 416.1404(a).

If the claimant is dissatisfied with the initial determination, he can seek reconsideration. 20 C.F.R. 416.1400(a)(2). A request for reconsideration must be submitted in writing within 60 days of the date the claimant receives notice of the initial determination, unless SSA grants a request to extend the time to request reconsideration for good cause. 20 C.F.R. 416.1409; see 20 C.F.R. 416.1411 (considerations relevant to good-cause determination). If the claimant timely requests reconsideration, the agency will conduct further review and render a "reconsidered determination" that "will

give the findings of fact and the reasons for the reconsidered determination." 20 C.F.R. 416.1417(a) and (b); see 20 C.F.R. 416.1413-416.1422. If, on the other hand, the claimant does not timely seek reconsideration, the initial determination becomes binding. 20 C.F.R. 416.1405.

b. *ALJ hearing and decision.* If the claimant is dissatisfied with the reconsidered determination, he may request a hearing before an ALJ. 20 C.F.R. 416.1400(a)(3); see 20 C.F.R. 416.1429-416.1435. A request for a hearing must be submitted in writing within 60 days of receipt of the reconsidered determination, unless SSA grants a request to extend the time to request a hearing for good cause. 20 C.F.R. 416.1433(b) and (c) (cross referencing good-cause factors in 20 C.F.R. 416.1411); see also 42 U.S.C. 405(b)(1), 1383(c)(1)(A) (hearing must be requested within 60 days).

If an ALJ hearing is timely requested, the ALJ will ordinarily conduct a hearing and receive additional submissions. See 20 C.F.R. 416.1436, 416.1446, 416.1449-416.1452; see also 20 C.F.R. 416.1448 (listing circumstances in which oral hearing may be waived). The ALJ will then typically issue a "written decision" based on "the preponderance of the evidence" that "gives the findings of fact and the reasons for the decision." 20 C.F.R. 416.1453(a). Alternatively, an ALJ may issue a recommended decision and transfer the case to the Appeals Council. 20 C.F.R. 416.1453(d).

If a claimant submits an untimely request for an ALJ hearing and does not demonstrate "good cause for missing the deadline," 20 C.F.R. 416.1433(c), the ALJ will

"dismiss" the hearing request. 20 C.F.R. 416.1457(c)(3).[2] If the claimant believes that the ALJ's dismissal of a hearing request was erroneous, the regulations permit the claimant, within 60 days of receipt of notice of the dismissal of the hearing request, to request that an ALJ or the Appeals Council vacate the ALJ's dismissal. 20 C.F.R. 416.1460(a). The ALJ or the Appeals Council also may vacate the dismissal *sua sponte*. *Ibid.* The regulations state that "[t]he dismissal of a request for a hearing is binding, unless it is vacated by an [ALJ] or the Appeals Council." 20 C.F.R. 416.1459. SSA has interpreted this regulation to mean that "an ALJ's order finding no good cause for a late hearing request and dismissing the request as untimely is not subject to judicial review." 81 Fed. Reg. 13,438, 13,439 (Mar. 14, 2016); see also 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request "to extend the time period for requesting review of a determination" is "not subject to the administrative review process" and is "not subject to judicial review").[3] If the claimant does not request an ALJ

---

[2] An ALJ may dismiss a hearing request on other grounds as well: if the claimant has withdrawn the hearing request; if the claimant fails to appear at a scheduled hearing without good cause; if the claim is barred by *res judicata* because of a prior final decision on the same claim; if the claimant is not entitled to a hearing; or if the claimant has died with no survivor or other parties to the claim. 20 C.F.R. 416.1457.

[3] SSA has explained that its regulations define the term "decision" to mean the decision of an ALJ or the Appeals Council, 20 C.F.R. 416.1401, and that a "decision" by an ALJ is subject to review by the Appeals Council and ultimately may be subject to judicial review, 20 C.F.R. 416.1455. See 81 Fed. Reg. at 13,439. SSA has further explained that an ALJ's dismissal of a hearing request, on the other hand, is not a "decision" under the regulations; although a dismissal may be vacated by an ALJ or the Appeals Council pursuant to a specific regulation, 20 C.F.R. 416.1460(a), the

hearing, the reconsidered determination becomes binding. See 20 C.F.R. 416.1421; see also 20 C.F.R. 416.1417(d).

c. *Appeals Council review.* If a claimant is dissatisfied with an ALJ's decision on the merits, he may request review by the Appeals Council. 20 C.F.R. 416.1400(a)(4); see 20 C.F.R. 416.1467-416.1481. To do so, the claimant must file a written request for review within 60 days after receiving notice of the ALJ's decision, unless the Appeals Council extends that deadline for good cause. 20 C.F.R. 416.1468 (cross referencing good-cause factors in 20 C.F.R. 416.1411).

If the claimant timely requests review (or the untimely filing is excused), the Appeals Council may then either grant or deny review. 20 C.F.R. 416.1467, 416.1481; see 20 C.F.R. 416.1470 (2014) (setting forth criteria for cases Appeals Council will review); 20 C.F.R. 416.1470 (2018) (similar but establishing additional limitations on circumstances in which Appeals Council will consider new evidence). The Appeals Council may also initiate review on its own motion. 20 C.F.R. 416.1469. If the Appeals Council grants review, it will subsequently either "issue a decision" on the merits of the claim or "remand" the case to an ALJ for further proceedings. 20 C.F.R. 416.1467; see 20 C.F.R. 416.1479. If the Appeals Council issues a decision and the claimant is dissatisfied with the decision, he may then seek judicial review by filing an action in federal district court under 42 U.S.C. 405(g) within 60 days, unless that period is extended for good cause. 20 C.F.R.

---

regulations provide that the dismissal is binding unless vacated and is not subject to the regular administrative-review process or to judicial review, 20 C.F.R. 416.1403(a)(8), 416.1459. See 81 Fed. Reg. at 13,439.

416.1400(a)(5), 416.1479-416.1482; see 42 U.S.C. 405(g), 1383(c)(3) (civil action must be commenced within 60 days or within such further time as SSA may allow). If judicial review is not sought, the Appeals Council's decision becomes binding. 20 C.F.R. 416.1481. If the Appeals Council denies review, then the ALJ's decision becomes SSA's final decision, *ibid.*, and the claimant may seek judicial review of that final decision. See 20 C.F.R. 416.1400(a)(5). With exceptions not implicated here, if the Appeals Council denies review and judicial review of the ALJ's decision is not sought, the ALJ's decision becomes binding. 20 C.F.R. 416.1455, 416.1481.

If the claimant seeks Appeals Council review but does not file his request "within the stated period of time and the time for filing has not been extended," SSA's regulations have long provided that the Appeals Council "will dismiss [the] request for review." 20 C.F.R. 416.1471; see 25 Fed. Reg. 1677, 1682 (Feb. 26, 1960) (20 C.F.R. 404.952(c) (1961)).[4] Since 1980, the regulations have further provided that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. 416.1472; see 45 Fed. Reg. 52,078, 52,096, 52,104 (Aug. 5, 1980). SSA has interpreted this regulation to mean that "an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" within the meaning of 42 U.S.C. 405(g), and thus "is not judicially reviewable." 64 Fed. Reg. 57,687, 57,689 (Oct. 26, 1999); see 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request "to extend the time period for requesting review of * * * a decision" is "not subject to

---

[4] The Appeals Council also may dismiss a request for review upon the claimant's request or because of the death of the claimant with no survivor or other parties to the claim. 20 C.F.R. 416.1471.

the administrative review process" and is "not subject to judicial review").[5]

B. Proceedings In This Case

1. a. In 1987, petitioner filed an application for supplemental-security-income benefits under Title XVI of the Social Security Act on the basis of disability. Pet. App. 3a. In 1988, an ALJ issued a favorable ruling, and petitioner began receiving benefits. *Ibid.* Those benefits continued until 2004, when they were terminated because petitioner's resources were found to exceed the qualifying threshold. *Ibid.*

b. i. In 2012, petitioner filed a new application for supplemental-security-income benefits, alleging that additional medical conditions rendered him disabled.

---

[5] SSA's regulations provide for two other forms of administrative review in limited circumstances. First, the regulations establish an "expedited appeals process" for cases in which the claimant and SSA agree that "the only factor preventing a favorable" ruling for the claimant "is a provision in the law that [the claimant] believe[s] is unconstitutional." 20 C.F.R. 416.1424(d); see 20 C.F.R. 416.1423-416.1428; cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) (discussing permissibility of dispensing with full exhaustion of the administrative-review process through the Appeals Council stage in such circumstances). That procedure may be commenced at various points during the administrative-review process after issuance of a reconsidered determination until the Appeals Council has acted. See 20 C.F.R. 416.1424(a), 416.1425(a). Second, on a claimant's request or SSA's own motion, SSA may reopen and revise a determination or decision even if the claimant did not timely request administrative review. 20 C.F.R. 416.1487; see 20 C.F.R. 416.1488-416.1489 (specifying deadlines and available grounds for seeking reopening); see also *Califano* v. *Sanders*, 430 U.S. 99, 104-109 (1977) (holding that SSA's denial of a request for reopening is not judicially reviewable absent a constitutional claim). Neither of these avenues for review is at issue here.

Pet. App. 3a. SSA issued an initial determination denying petitioner's application, and upon reconsideration SSA again denied his claim. *Ibid.*

Petitioner filed a timely request for a hearing before an ALJ. Pet. App. 3a. On February 18, 2014, an ALJ conducted a hearing on petitioner's application. *Id.* at 22a-23a. On March 26, 2014, the ALJ issued a decision denying petitioner's claim for benefits, finding that he was not disabled within the meaning of the Act. *Id.* at 3a; J.A. 4-23. The notice of decision sent to petitioner informed him that he had 60 days to file a written appeal in order to obtain review by the Appeals Council, and that an untimely appeal would be dismissed unless petitioner could "show [he] had a good reason for not filing it on time." J.A. 5; see 20 C.F.R. 416.1468, 416.1472. Petitioner was further informed, consistent with SSA's regulations, that if he did not seek review by the Appeals Council and the Appeals Council did not review the ALJ's decision on its own, then the ALJ's "decision [would] become final" and petitioner "[would] not have the right to Federal court review." J.A. 6-7; see 20 C.F.R. 416.1472.

ii. According to petitioner, on April 24, 2014—within the 60-day period for appealing to the Appeals Council—his counsel sent a letter via first-class U.S. mail to the Appeals Council requesting review. See Pet. App. 3a-4a & n.1; D. Ct. Doc. 9, at 1 (Mar. 31, 2016); see also J.A. 24-29 (letter from petitioner's counsel with a date of April 24, 2014). Petitioner further maintains that, at the request of an SSA claims representative, his counsel sent a fax to SSA on September 21, 2014 inquiring about the status of petitioner's request for Appeals Council review and attaching a copy of a letter bearing an April 24, 2014 date requesting review, which counsel asserted

he had timely filed. See Pet. App. 3a; D. Ct. Doc. 9, at 2; see also J.A. 30-37 (fax from petitioner's counsel). On October 1, 2014, the SSA claims representative responded by letter to the September 21 fax, suggesting that SSA had not received petitioner's April 24 letter requesting Appeals Council review because that letter had not been placed in SSA's "electronic folder" and because, if SSA had received the request for Appeals Council review, it would have mailed a receipt. See Pet. App. 3a-4a; D. Ct. Doc. 9, at 2; see also J.A. 38 (letter from SSA claims representative). The claims representative completed a request-for-review form for petitioner, mailed that form to the Appeals Council, and informed petitioner that his appeal request was deemed filed as of October 1. See Pet. App. 4a; D. Ct. Doc. 9, at 2; see also J.A. 38-39.

There is a discrepancy between petitioner's account and SSA's records. An SSA official responsible for the processing of claims for Title XVI benefits in Kentucky has stated in a sworn declaration that, based on her review of SSA's records, the first correspondence SSA received in petitioner's case following the ALJ's decision was a fax from petitioner on October 1, 2014, including an undated request-for-review form, a copy of a letter dated April 24, 2014, and a fax cover sheet dated September 21. J.A. 48-51.

iii. On November 6, 2015, the Appeals Council issued an order dismissing petitioner's appeal as untimely under 20 C.F.R. 416.1471. See J.A. 40-42. The order stated that "[t]he request for review filed on October 1, 2014, was not filed within 60 days from the date notice of the decision was received as required by 20 C.F.R. 416.1468(a)." J.A. 41. The order explained

that, although the deadline could be extended retroactively "if good cause is shown for missing the deadline," the Appeals Council "[found] that there is no good cause to extend the time for filing" here. J.A. 41-42. The order further stated that "[petitioner's] representative submitted a good cause statement on October 1, 2014 indicating he had previously filed a brief on April 24, 2014"—apparently a reference to the September 21, 2014 fax from petitioner's counsel stating that he had requested Appeals Council review on April 24, 2014 and attaching a letter dated April 24—but that "[SSA] did not receive this brief before October 1, 2014," and petitioner's counsel had not "supplied evidence indicating it was sent within the appropriate period of time." J.A. 42. The Appeals Council therefore "dismisse[d] [petitioner's] request for review" and stated that "[t]he [ALJ's] decision stands as the final decision of the Commissioner." *Ibid.* SSA's cover letter enclosing the Appeals Council's order stated that, "[u]nder our rules, the dismissal of a request for review is final and not subject to further review." J.A. 40.

2. a. Petitioner brought this action in the District Court for the Eastern District of Kentucky seeking review of the Appeals Council's order dismissing his request for review. Pet. App. 4a, 23a. The Acting Commissioner of Social Security moved to dismiss for lack of jurisdiction and failure to state a claim, or alternatively for summary judgment, arguing that the Appeals Council's order dismissing petitioner's request for review was not a "final decision" subject to judicial review under 42 U.S.C. 405(g). See D. Ct. Doc. 8, at 2 (Mar. 14, 2016). The Acting Commissioner contended that, under SSA's regulations, "[t]he dismissal of a request for

Appeals Council review is binding and not subject to further review," and that "it is only after the Appeals Council has *denied* review, or has *granted* review and issued its own decision, that the Commissioner has rendered a 'final decision' on the claim for benefits, which is then subject to judicial review pursuant to 42 U.S.C. § 405(g)." *Ibid.* (citing 20 C.F.R. 416.1472).

The district court granted the Acting Commissioner's motion to dismiss. Pet. App. 22a-26a. The court reasoned that, under SSA's regulations, "[r]eview by a federal court is only available once a claimant has completed all of the steps of the administrative process." *Id.* at 24a. The court concluded that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim." *Id.* at 25a.[6] The court relied on SSA's regulation specifying that a decision of the Appeals Council dismissing a request for review as untimely is "binding and not subject to further review," *id.* at 24a (citing 20 C.F.R. 416.1472), and on Sixth Circuit precedent, see *id.* at 24a-25a.

The district court also determined that petitioner had not pleaded a "colorable constitutional claim," rejecting (as relevant here) petitioner's contention that the Due Process Clause of the Fifth Amendment compelled a finding that his request for review had been

---

[6] In *Califano* v. *Sanders*, this Court explained that it had "authorized judicial review under [Section 405(g)]," despite a failure to fully exhaust administrative remedies, in cases where enforcing the waivable exhaustion requirement "would effectively have closed the federal forum to the adjudication of colorable constitutional claims." 430 U.S. at 108-109 (citing *Salfi*, *supra*, and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)).

timely submitted. Pet. App. 25a. The court stated that petitioner had not "offer[ed] any proof that he mailed his written request on April 24, 2014, aside from his own testimony." *Ibid.* The court explained that, "[a]bsent independent evidence, such as a postmark or dated receipt," it "[could] not reverse the Appeals Council's determination" of untimeliness. *Ibid.*

Petitioner moved for relief from the judgment under Federal Rule of Civil Procedure 59(e). Pet. App. 16a. The district court denied the motion. *Id.* at 16a-21a.

b. The court of appeals affirmed. Pet. App. 1a-15a. The court observed that, under SSA's regulations, an order by the Appeals Council dismissing a request for review "is binding and not subject to further review," and that "[j]udicial review is available only after administrative exhaustion." *Id.* at 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, 416.1472). The court noted that it "ha[d] not directly addressed * * * in a published opinion" whether such Appeals Council dismissals are reviewable under 42 U.S.C. 405(g), but that it had previously held that judicial review was not available in a "similar" context where an ALJ dismissed a request for a hearing as untimely. See Pet. App. 6a (citing *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 68-70 (6th Cir. 1993)). The court stated that *Hilmes* had "followed the * * * rationale" of this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), which "held that," when SSA denies "a petition to reopen a prior final decision," judicial review of that denial "is unavailable in the absence of a colorable constitutional claim." Pet. App. 5a-6a. The court of appeals observed that this Court in *Sanders* had "reasoned that[ ] 'an interpretation that would allow a claimant

judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [42 U.S.C. 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits.'" Pet. App. 5a-6a (quoting 430 U.S. at 108). The court of appeals adhered to its understanding of the reasoning of *Hilmes* and *Sanders* and "conclude[d] that Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court." *Id.* at 8a.

The court of appeals noted that its decision accorded with "the majority view [of the courts of appeals] * * * that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute 'final decisions' reviewable by district courts," citing decisions of seven other courts. Pet. App. 7a-8a (citing *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon* v. *Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock* v. *Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Adams* v. *Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985); and *Dietsch* v. *Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983)). Only the Eleventh Circuit, the court of appeals continued, had reached a contrary conclusion, in its 1983 decision in *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1238-1239.[7]

---

[7] Although not mentioned by the court of appeals here, the Seventh Circuit had recently issued a decision holding, consistent with *Bloodsworth*, that Appeals Council dismissal orders are subject to

The court of appeals specifically endorsed the reasoning of the Eighth Circuit in *Smith*, which had stated that when the Appeals Council dismisses a request for review as untimely, the dismissal order "does not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review." Pet. App. 7a (quoting 761 F.2d at 518). The court here further echoed the Eighth Circuit's statement that, "[i]f the claimant may obtain review in this situation," then "the Secretary's orderly procedures for processing disability claims mean little or nothing," and "any claimant could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision." *Id.* at 7a-8a (quoting *Smith*, 761 F.2d at 518).

The court of appeals additionally determined that petitioner did not have a colorable due process claim that would be reviewable under 42 U.S.C. 405(g). Pet. App. 8a-14a. As relevant here, the court rejected petitioner's contention that the Appeals Council violated his due process rights by refusing to consider what petitioner maintained was a timely-submitted request for review, citing a "lack of independent evidence" to corroborate petitioner's assertion that he in fact submitted his request on time. *Id.* at 10a.

SUMMARY OF ARGUMENT

The government urged the courts below—consistent with the Social Security Administration's longstanding position—that the Appeals Council order dismissing petitioner's request for review as untimely is not judi-

---

judicial review. See *Casey* v. *Berryhill*, 853 F.3d 322, 326 & n.1 (2017).

cially reviewable. The government has, however, reconsidered the question and has now concluded that a dismissal order is subject to judicial review, limited to the procedural ground on which the agency based its dismissal.

A. The Appeals Council order dismissing petitioner's appeal was a "final decision * * * made after a hearing" within the meaning of 42 U.S.C. 405(g), as incorporated by 42 U.S.C. 1383(c)(3). SSA's regulations are clear that, following the dismissal order, the agency will take no further action in petitioner's case. 20 C.F.R. 416.1472. That order is therefore a "final decision" both in the ordinary sense and as that term is typically used in administrative law. The order marked the end of the agency's adjudicative process, and it has legal consequences because it constituted the agency's conclusive determination that petitioner's administrative appeal was not timely and so petitioner was not entitled to pursue his benefits claim any further in the agency. The agency's decision was made "after a hearing" as that term is used in Section 405(g), because petitioner in this case had a hearing before an administrative law judge, and because petitioner complied with the procedures required of him by SSA regulations to obtain a decision from the agency regarding timeliness, see 20 C.F.R. 416.1468.

The availability of judicial review in this case is confirmed by a separate sentence of Section 405(g) providing that where SSA has issued an adverse decision because of the claimant's "failure * * * to submit proof in conformity with [an agency] regulation," judicial review will not be entirely foreclosed, but will be narrow: "[T]he court shall review only the question of conformity with [the agency's] regulations." 42 U.S.C.

405(g). That limited authorization of judicial review is consistent with the general administrative-law principle that a court reviewing an agency decision is limited to reviewing the grounds the agency gave for its decision. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943). That the Act explicitly addresses the scope of judicial review when the claimant has not complied with a regulatory requirement supports the conclusion that petitioner may seek judicial review of the Appeals Council's determination that he did not comply with the regulation governing requests for Appeals Council review.

Reading Section 405(g) to authorize judicial review of the Appeals Council's untimeliness decision accords with this Court's, and lower courts', interpretation of other statutory exhaustion and finality requirements, according to which courts may review an agency's decision whether a claimant exhausted administrative remedies. Judicial review also avoids the potential for a claimant to be wrongly denied benefits should the agency commit a clear error regarding timeliness or another procedural requirement.

B. The reasons advanced by a number of courts of appeals to support their conclusion that an Appeals Council dismissal order is not judicially reviewable under 42 U.S.C. 405(g) are unpersuasive. If those courts were correct that a dismissal order is not a "final decision" or was not made "after a hearing," *ibid.*, then the agency would never issue a final decision in the claimant's case, because the agency's regulations are clear that it will take no further action following the dismissal. See 20 C.F.R. 416.1472. That result would be inconsistent with the statute, which "direct[s]" the agency to issue a "decision[ ]" on every application for benefits. 42 U.S.C. 405(b)(1), 1383(c)(1)(A).

It makes no difference that the Appeals Council did not hold an oral hearing before dismissing petitioner's appeal, because SSA regulations call for a timeliness question to be resolved by written submissions rather than an oral hearing, and this Court has concluded that the "after a hearing" requirement in 42 U.S.C. 405(g) is not a barrier to judicial review where, as here, the agency has determined that no such hearing is necessary. See *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975). It likewise makes no difference that the Appeals Council order did not address the merits of petitioner's claim for benefits, because Section 405(g) does not limit judicial review to cases in which the most recent agency ruling addressed the merits of the claim.

This Court's holding in *Califano* v. *Sanders*, 430 U.S. 99 (1977), does not carry over to a conclusion that Appeals Council dismissal orders are not judicially reviewable. There are important differences between SSA's discretionary decision to reopen an already-final decision—at issue in *Sanders*—and the agency's decision in this case that petitioner did not exhaust administrative remedies, which is a question courts ordinarily review. In addition, the Court in *Sanders* sought to preserve Congress's 60-day limit for a claimant to seek judicial review of final administrative orders, but that limit is not at issue in this case.

Although the court of appeals' holding in this case is consistent with SSA's longstanding regulation, that regulation exceeds the agency's rulemaking authority because it is "inconsistent with the provisions" of the Act. 42 U.S.C. 405(a). The agency has significant discretion to determine what procedures a claimant must follow to exhaust administrative remedies, and whether to waive exhaustion for any particular claimant. But the

agency does not have authority to preclude judicial review of the Appeals Council's order finding untimeliness. Judicial review in this case would not undermine the agency's detailed requirements for administrative review. The very question petitioner seeks to have the court decide is whether he complied with the agency's procedural requirements. The statute provides for the court to answer that question—but "only" that question—and to afford the agency appropriate deference by looking only to whether SSA's factual findings are supported by "substantial evidence," 42 U.S.C. 405(g), and whether a failure to find good cause to excuse a late filing was an abuse of discretion. That limited form of judicial review does not meaningfully threaten SSA's administrative-review system.

ARGUMENT

A SOCIAL SECURITY APPEALS COUNCIL ORDER DISMISSING A REQUEST FOR REVIEW AS UNTIMELY IS JUDICIALLY REVIEWABLE UNDER 42 U.S.C. 405(g)

The court of appeals' conclusion that "Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court" under the Social Security Act, Pet. App. 8a, was consistent with the government's longstanding position, which has been reflected in SSA regulations in force since 1980. See pp. 9-10, *supra*.[8] Until 2017, that position had been endorsed by all but one of the courts of appeals to address the issue. See p. 16, *supra*. The government

---

[8] Before SSA codified its position by regulation, the agency similarly maintained that an Appeals Council dismissal of a request for review as untimely was not judicially reviewable. See, *e.g.*, *Sheehan* v. *Secretary of Health, Educ. & Welfare*, 593 F.2d 323, 325-326 (8th Cir. 1979) (holding that Appeals Council dismissal was not reviewable).

advocated that position in this case: In the district court and the court of appeals, the Acting Commissioner of Social Security contended that SSA has validly promulgated a regulation providing that an Appeals Council dismissal of a request for review does not constitute a "final decision" subject to judicial review under 42 U.S.C. 405(g). Gov't C.A. Br. 8-12; D. Ct. Doc. 8, at 1-2. The government has taken that position in many other cases and other contexts as well.[9]

In light, however, of the petition for a writ of certiorari in this case and the Seventh Circuit's recent contrary decision in *Casey* v. *Berryhill*, 853 F.3d 322 (2017), the government reexamined the question and concluded that its prior position was incorrect, as explained in the government's response to the certiorari petition.[10] The Appeals Council order dismissing petitioner's request for review—by which SSA conclusively determined the timeliness of petitioner's appeal request and also made clear that it will take no further action on petitioner's claim for benefits—is a "final decision," both in the ordinary sense of that term and under its customary usage in administrative law. Such decisions are subject to judicial review under 42 U.S.C. 405(g). Although SSA has authority to prescribe what steps a claimant must follow in order to exhaust administrative remedies,

---

[9] See, *e.g.*, Br. in Opp. at 10 n.4, *Lary* v. *Chater*, 522 U.S. 812 (1997) (No. 96-1849) (arguing in a Medicare case also governed by Section 405(g) that an Appeals Council dismissal was not reviewable).

[10] Following this Court's grant of the petition for a writ of certiorari in this case, SSA has begun the process of revising its notice to claimants who receive Appeals Council orders dismissing petitions for review as untimely, and this Office has directed that the government not argue to federal courts that they may not review an Appeals Council dismissal order, pending this Court's decision in this case.

Weinberger v. *Salfi*, 422 U.S. 749, 766 (1975), and generally has discretion whether to waive the requirement of complete exhaustion through the Appeals Council stage as a precondition to judicial review, *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986), SSA's authority and discretion in those respects do not deprive federal district courts of authority to review whether a claimant has complied with the exhaustion requirement. Petitioner's complaint in this case sought judicial review on *that* question, and the district court's dismissal of that request for relief was error.

A. Section 405(g) Authorizes Judicial Review Of The Appeals Council's Conclusion That A Claimant Failed To Exhaust Administrative Remedies

The relevant question on which petitioner seeks judicial review in this case is whether he submitted a timely appeal to the SSA Appeals Council, with the result that he may continue contesting (before the agency) the ALJ's determination that he is not entitled to benefits: Petitioner alleged in his complaint that the ALJ's "denial decision was timely appealed to the Appeals Council on April 24, 2014[,] which the Appeals Council improperly dismissed," and that he "has exhausted all of his administrative remedies." J.A. 46.[11] Section 405(g), as incorporated by 42 U.S.C. 1383(c)(3), permits judicial review on the timeliness question if the Acting Commissioner has rendered "a 'final decision' * * * after a 'hearing.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976) (quoting 42 U.S.C. 405(g)). She has. In the

---

[11] Petitioner's complaint also requested judicial review of the question on the merits whether he is entitled to benefits. J.A. 46-47. But petitioner is not entitled to judicial review of that question at this time, as explained at pages 29-30, *infra*.

course of administrative proceedings on his benefits application, petitioner submitted the timeliness question to SSA using the procedure the agency's regulations afforded him. J.A. 30-37. The Appeals Council, after considering the question, reached a conclusive determination regarding timeliness that it will not revisit, and dismissed petitioner's request for review. J.A. 40-42. The result of that dismissal was to leave standing and render binding the ALJ's rejection on the merits of petitioner's claim for benefits. See 20 C.F.R. 416.1455. Simply put, there was nothing left for the agency to consider or do. The Appeals Council's order dismissing petitioner's request for review as untimely is accordingly final and subject to judicial review.

1. This Court has held that Section 405(g)'s "condition" on judicial review "consists of two elements": a "jurisdictional," "nonwaivable * * * requirement that a claim for benefits shall have been presented to the [Commissioner]," and a nonjurisdictional, "waivable * * * requirement that the administrative remedies prescribed by the [Commissioner] be exhausted." *Eldridge*, 424 U.S. at 328; accord *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000) (Section 405(g) imposes a "nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court," and an additional requirement that a claimant exhaust "the procedural steps set forth in § 405(g)").[12] Here, both requirements

---

[12] Because Section 405(g)'s exhaustion requirement is "waivable," *Eldridge*, 424 U.S. at 328, the court of appeals erred in holding that petitioner's complaint should be dismissed "for lack of subject matter jurisdiction," Pet. App. 5a, even if this Court concludes—contrary to the government's present position—that the Appeals

were satisfied. The nonwaivable presentment requirement was satisfied because petitioner "presented" his "claim for benefits" to SSA by filing an application, *Eldridge*, 424 U.S. at 328; see Pet. App. 3a, and also presented to the agency the question on which he now seeks judicial review: whether he timely submitted his request for Appeals Council review. See Pet. App. 3a-4a, J.A. 30-37.

Section 405(g)'s waivable exhaustion-of-remedies requirement—that SSA must have rendered a "final decision" made "after a hearing," *Eldridge*, 424 U.S. at 328 (citation and internal quotation marks omitted)—is satisfied as well. The Social Security Act "does not define 'final decision.'" *Sims* v. *Apfel*, 530 U.S. 103, 106 (2000). "When a term goes undefined in a statute," the Court typically will "give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). And where an undefined statutory phrase is a "term of art" or otherwise has a well-established meaning in a given statutory context, the Court will consult that meaning. *Magwood* v. *Patterson*, 561 U.S. 320, 332 (2010) (citation omitted); see also, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612-613 (1992). Here, both the ordinary meaning of "final decision" and its familiar meaning in the context of administrative adjudications point to the conclusion that Appeals Council dismissal orders are final decisions under 42 U.S.C. 405(g).

a. SSA indisputably reached a "decision"—a determination after consideration—on both the timeliness of petitioner's request for Appeals Council review and whether he will be permitted to pursue his benefits

---

Council's dismissal order was not a "final decision" reviewable under 42 U.S.C. 405(g).

claim further. See *Webster's New International Dictionary of the English Language* 680 (2d ed. 1949) (defining "decision" as "a determination or result arrived at after consideration, as of a question"). The Appeals Council determined that petitioner did not "sen[d]" his request for review within the 60-day limit established by regulation, and that "there is no good cause to extend the time for filing," with the result that the ALJ's "decision stands as the final decision of the Commissioner." J.A. 42.

b. SSA's decision was "final." In ordinary usage, a decision is "final" if it "[p]ertain[s] to, or occur[s] at, the end or conclusion" of a process, or if it is "[c]onclusive," "decisive," or "definitive." *Webster's New International Dictionary* 948. An Appeals Council order dismissing as untimely a request for review of an ALJ decision is final under each of those definitions. SSA's regulations provide that such a dismissal order "is binding and not subject to further review." 20 C.F.R. 416.1472. The dismissal order thus marks the end of SSA's consideration of a benefits application and is conclusive of whether the claimant will be permitted to further pursue his claim for benefits in the agency.

In the administrative-law context, this Court's precedent ascribes a similar meaning to "final" agency action. For purposes of the availability of judicial review under the Administrative Procedure Act (APA), ch. 324, 60 Stat. 237, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, 5 U.S.C. 704, the Court has explained that, "[a]s a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997) (citation omitted). "First, the action must mark the 'consummation' of the agency's decisionmaking

process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (quoting *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

An Appeals Council dismissal order bears both of those "hallmarks of APA finality." *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012). Such an order does not represent a "merely tentative or interlocutory" determination, but instead marks the end of the agency's consideration. *Bennett*, 520 U.S. at 178. SSA's regulations provide that the agency will not "review" the dismissal order further. 20 C.F.R. 416.1472. The dismissal order also has "legal consequences" and determines the claimant's "rights [and] obligations," *Bennett*, 520 U.S. at 178 (citation omitted), because it renders binding the ALJ's decision regarding the applicant's entitlement to receive the requested benefits and bars the claimant from contesting the ALJ's decision further in the agency. 20 C.F.R. 416.1455 (ALJ's decision is "binding" if not reviewed); see *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) (an "Appeals Council decision not to review *finalizes* the decision made after a hearing by the [ALJ]"). Although the APA was enacted in 1946, see ch. 324, 60 Stat. 237—after 42 U.S.C. 405(g) (Supp. V 1939), which was enacted in 1939, see Social Security Act Amendments of 1939, ch. 666, Tit. II, sec. 201, § 205(g), 53 Stat. 1370-1371—the APA codified preexisting principles of judicial review of agency action, see, *e.g.*, *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S.

270, 282 (1987), and is instructive on the meaning of "final decision" under 42 U.S.C. 405(g).

c. The Appeals Council's dismissal of petitioner's request for review also satisfies the "after a hearing" condition on judicial review, as that phrase is used and has been understood in 42 U.S.C. 405(g). The ALJ's decision regarding petitioner's claim for benefits, J.A. 4-23, was made after the ALJ conducted an oral hearing on petitioner's application in February 2014. See Pet. App. 22a-23a. And whereas the Appeals Council's decision regarding the timeliness of petitioner's request for review was not the subject of an oral hearing, that is because SSA's regulations do not call for an oral hearing to resolve a question of timeliness; the regulations instead directed petitioner to submit a request to the Appeals Council in writing. See 20 C.F.R. 416.1468. The Appeals Council issued its decision regarding timeliness and dismissed petitioner's request for review after petitioner completed the procedure required by the agency's regulations: he submitted a written request for review and explained why he believed his request was timely filed. See *ibid.*; Pet. App. 3a-4a; J.A. 30-37.

In *Salfi*, this Court held that Section 405(g)'s "after a hearing" requirement was not a barrier to judicial review of questions on which the Secretary had concluded that no hearing was required, 422 U.S. at 767, and the Court explained that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue," *id.* at 765. Because the administrative scheme here called for review by the Appeals Council after an ALJ hearing, and called for the Appeals Council to resolve the timeliness

issue based on petitioner's written submission, the prerequisites for judicial review under Section 405(g) were satisfied.

2. A separate sentence of Section 405(g) supports the conclusion that an Appeal Council dismissal of a request for review as untimely is judicially reviewable. That sentence provides that "where a claim has been denied by the Commissioner * * * because of failure of the claimant * * * to submit proof in conformity with any regulation prescribed under [42 U.S.C. 405(a)]," judicial review will remain available but will be narrow: "[T]he court shall review only the question of conformity with [the agency's] regulations and the validity of such regulations." 42 U.S.C. 405(g). That limited authorization of judicial review accords with the general administrative-law principle that a court reviewing an agency decision is limited to reviewing the grounds the agency gave for its decision. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

Here, that sentence in Section 405(g) indicates that a court likewise may review a claimant's compliance with SSA regulations regarding the timeliness of a request for Appeals Council review of an ALJ's decision. In this case, the Acting Commissioner issued a final, adverse decision that denied petitioner the opportunity to further challenge the ALJ's decision, on the ground that he had failed to submit his claim for benefits to the Appeals Council in conformity with the agency's timeliness regulation for seeking Appeals Council review, 20 C.F.R. 416.1468(a), which the agency prescribed pursuant to Section 405(a). As a result, a federal court may review "only" whether petitioner "conform[ed]" with the agency's regulation, and the agency's factual findings on that question "shall be conclusive" as long as

they are "supported by substantial evidence." 42 U.S.C. 405(g). That is, the court may review whether the agency's finding that petitioner did not submit a timely appeal to the Appeals Council is supported by substantial evidence, and whether the agency abused its discretion in concluding that good cause for excusing untimeliness did not exist; but the court may not go further and review now whether petitioner is entitled to benefits. See, *e.g.*, *Casey*, 853 F.3d at 329 (rejecting SSA's determination regarding timeliness but explaining that, because there was "no 'final decision' on the underlying merits" of the plaintiff's benefits application, the merits were "a question for the agency to consider on remand") (citation omitted).[13] The Act does not, however, entirely foreclose judicial review of whether petitioner complied with the agency's regulations. It follows that SSA's regulations providing that an Appeals Council order dismissing a request for review as untimely is not subject to judicial review are inconsistent with the Act and should not be given effect.

3. Section 405(g)'s authorization of judicial review in this case, limited to review of the agency's determination of untimeliness, is consistent with the federal courts' approach to exhaustion in other contexts. There are many other statutes that, like the Social Security Act, impose statutory exhaustion requirements—often

---

[13] In *Bloodsworth*, the court of appeals correctly found that the Appeals Council's timeliness conclusion was judicially reviewable, but the court then incorrectly proceeded to consider the merits of the claimant's entitlement to benefits. See 703 F.2d at 1239-1243. The *Bloodsworth* court did not explain why it believed it was permitted to review the merits, notwithstanding *Chenery* and 42 U.S.C. 405(g).

similarly calling for judicial review after an agency's "final decision" or "final order"—but lower courts routinely treat agency dismissals on untimeliness or other procedural or jurisdictional grounds as final, and the courts review whether the plaintiff exhausted administrative remedies (or should be excused from the obligation to do so). See, *e.g.*, *Higgs* v. *Attorney Gen. of the U.S.*, 655 F.3d 333, 338 (3d Cir. 2011) (overturning agency's determination that petitioner failed to properly file an administrative appeal); *Auburn Reg'l Med. Ctr.* v. *Sebelius*, 642 F.3d 1145, 1147-1148 (D.C. Cir. 2011) (agency dismissal on timeliness grounds "is final in any sense of the word" under statute authorizing judicial review of "any final decision" of the agency), rev'd on other grounds, 568 U.S. 145 (2013); *Khan* v. *U.S. Dep't of Justice*, 494 F.3d 255, 259-260 (2d Cir. 2007) (reviewing agency decision that administrative appeal was untimely pursuant to provision of Immigration and Nationality Act authorizing judicial review of a "final order of removal"); *Cox* v. *Benefits Review Bd.*, 791 F.2d 445, 446-447 (6th Cir. 1986) (per curiam) (reviewing agency decision that administrative petition for review was insufficient to exhaust administrative remedies).

Reading Section 405(g) to authorize judicial review of the Appeals Council's timeliness determination also accords with the courts of appeals' routine practice of treating district-court decisions dismissing cases on jurisdictional or procedural grounds as "final decisions" reviewable under 28 U.S.C. 1291. See, *e.g.*, *Farzana K.* v. *Indiana Dep't of Educ.*, 473 F.3d 703, 708 (7th Cir. 2007); *Loya* v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir. 1983); *Athens Cmty. Hosp., Inc.* v. *Schweiker*, 686 F.2d 989, 993 (D.C. Cir. 1982), modified on reh'g, 743 F.2d 1 (D.C. Cir. 1984). This

Court has compared Section 405(g)'s "final decision" requirement to 28 U.S.C. 1291, and in doing so has stated that its "core principle" for interpreting "statutorily created finality requirements" is that those requirements "should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." *Eldridge*, 424 U.S. at 331 n.11.

As applied to the Social Security Act, the core principle identified by the Court supports giving Section 405(g) its most natural interpretation, which is to authorize judicial review of the Appeals Council's decisions regarding untimeliness. Under the contrary interpretation, if the Appeals Council's determination that a claimant did not timely request review is not supported by substantial evidence—or if the Appeals Council abused its discretion in finding no good cause to extend the deadline—then the claimant would be erroneously deprived of his statutory right to have a court review his entitlement to benefits at the conclusion of the agency's process. See 42 U.S.C. 405(g), 1383(c)(3).

B. The Court Of Appeals' Reasons For Refusing Judicial Review Are Not Persuasive

The court of appeals erred in holding that the SSA Appeals Council order dismissing petitioner's request for review of the ALJ's adverse decision entirely foreclosed judicial review of whether petitioner' administrative appeal was timely. As stated above, a number of other courts of appeals have reached the same conclusion, which comported with the government's longstanding position.[14] But on reexamining the question,

---

[14] See, *e.g.*, *Rothman* v. *Secretary of Health & Human Servs.*, 70 F.3d 110, 1994 WL 866086, at *1 (1st Cir. Dec. 8, 1994) (Tbl.);

the government has concluded that the reasoning in those decisions does not offer a sound basis for overriding the right to judicial review that Congress afforded to benefits applicants in 42 U.S.C. 405(g).

1. The court of appeals' conclusion that Appeals Council dismissal orders "are not final decisions," Pet. App. 8a, is inconsistent with the statutory structure and the practical effect of such an order. Upon issuance of the Appeals Council dismissal order, SSA's decision in petitioner's case was "final," for the reasons explained above. See pp. 26-28, *supra*. That order unequivocally marked the agency's last word on petitioner's benefits application; it was "not pending, interlocutory, tentative, conditional, doubtful, unsettled, or otherwise indeterminate." *Auburn Regional*, 642 F.3d at 1148. SSA regulations state that the dismissal "is binding and not subject to further review," 20 C.F.R. 416.1472, so after the dismissal order, there was nothing left for the agency (or petitioner) to do regarding his claim. The agency "[was] done." *Auburn Regional*, 642 F.3d at 1148.[15]

Bacon v. *Sullivan*, 969 F.2d 1517, 1519-1522 (3d Cir. 1992); *Dillow* v. *Sullivan*, 952 F.2d 1396, 1992 WL 6810, at *1 (4th Cir. Dec. 5, 1992) (per curiam) (Tbl.); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 739-743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Smith* v. *Heckler*, 761 F.2d 516, 518-519 (8th Cir. 1985); *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (9th Cir. 1990); *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 & n.2 (10th Cir. 1998); see also *Dietsch* v. *Schweiker*, 700 F.2d 865, 867-868 (2d Cir. 1983) (holding that review under Section 405(g) is unavailable and that review can be obtained only through a writ of mandamus)

[15] The only exception would be if SSA elected to reopen petitioner's case. See 20 C.F.R. 416.1487. But whether to reopen a case is entirely discretionary with the agency and is not subject to judicial review. See *Califano* v. *Sanders*, 430 U.S. 99, 104-109 (1977). SSA

Some of this Court's opinions have stated that "[i]f a claimant fails to request review from the [Appeals] Council, there is no final decision and, as a result, no judicial review in most cases." *Sims*, 530 U.S. at 107; see also *City of New York*, 476 U.S. at 482 ("Only a claimant who proceeds through all three stages [of administrative review] receives a final decision from the Secretary."). But the context of those decisions makes clear that the Court was describing the typical steps in the agency's regulations for a claimant to obtain judicial review of *the merits* of a benefits determination, and the consequence if the claimant does not pursue the claim through the entire administrative process. The Court has never had occasion to consider the question presented here, which is whether, when the claimant does seek Appeals Council review, the Appeals Council's order dismissing the request for review on untimeliness grounds precludes the district court from reviewing whether the claimant's request for administrative review was, in fact, untimely.

The court of appeals' interpretation of "final decision" is also inconsistent with other provisions of the Act. If the court's understanding of the Appeals Council's dismissal order were correct, then the agency would very likely *never* issue a "final decision" on petitioner's benefits application, 42 U.S. 405(g), because the agency has been clear that it will not take any further action following a dismissal. 20 C.F.R. 416.1472. As the Eleventh Circuit recognized in *Bloodsworth*, if Appeals Council dismissal orders were not reviewable, then "the claimant would never have a 'final' decision" and would be left "permanently in limbo." 703 F.2d at 1239. But

---

regulations did not require petitioner to request reopening before seeking judicial review. See 20 C.F.R. 416.1400(a)(4)-(5).

that result is difficult to square with the statutory "direct[ive]" to the Commissioner to issue a "decision[ ]" on each application for benefits. 42 U.S.C. 405(b)(1), 1383(c)(1)(A).

2. The Ninth Circuit, in an opinion reaching the same result as the decision below, relied on the fact that the Appeals Council did not itself hold a hearing before denying a request for an extension of time to appeal and dismissing a request for review. *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (1990) (finding that the agency had no "final decision[ ] * * * made after a hearing" because "the Appeals Council may deny a request for an extension without a hearing") (citation omitted). That reasoning rests on a misunderstanding of the phrase "after a hearing" in Section 405(g).

That SSA's regulations permit the agency to resolve a question of timeliness without an oral hearing does not undermine petitioner's entitlement to judicial review of that question. In *Salfi*, this Court upheld the claimants' right to judicial review of a challenge to the agency's denial of benefits based on statutory provisions making certain family members ineligible for mothers' and children's insurance benefits. See 422 U.S. at 766. Although SSA had not held an oral hearing in the course of denying the claims, the Court noted that SSA "may, of course, award benefits without requiring a hearing" and held that Section 405(g) permits judicial review where the Commissioner has made a final decision on issues "as to which he considers a hearing to be useless." *Id.* at 767; cf. *Eldridge*, 424 U.S. at 330 ("[T]he Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief

that is sought is beyond his power to confer."). This Court's cases thus stand for the proposition that, where SSA has determined that an oral hearing is not necessary to issue a final decision, judicial review of that decision is not barred for lack of a hearing.

Section 405(h) further reinforces the conclusion that an oral hearing is not always necessary to produce a binding and reviewable agency decision. That provision, which makes Section 405(g) the exclusive route to judicial review of SSA benefits decisions, also specifies that "[t]he findings and decision of the Commissioner of Social Security *after a hearing* shall be binding upon all individuals who were parties to such hearing." 42 U.S.C. 405(h) (emphasis added). Although Section 405(h) uses the same "hearing" language as Section 405(g), the statutory and regulatory scheme clearly contemplates decisions by the agency that are final and binding even though no hearing occurred. For example, this Court in *Salfi* held that Section 405(h)'s preclusion of review outside of Section 405(g) applies even where a claimant raises a constitutional challenge to the Act, and the Court approved SSA's authority to permit a claimant to proceed directly to federal court for resolution of that constitutional question, without the agency holding a hearing or completing the administrative-review process. See 422 U.S. at 757-761, 766-767. Similarly, SSA regulations permit an ALJ to issue a decision without holding an oral hearing where all parties agree that they do not want a hearing, 20 C.F.R. 416.1448(b)(i), and those decisions are entitled to binding effect under Section 405(h).

By the same logic, the "hearing" requirement of Section 405(g) is satisfied through the procedures the

agency deems necessary to render a binding, final decision on a benefits claim. Courts of appeals have nonetheless disagreed about, for example, whether an ALJ decision dismissing as untimely a request for the ALJ "hearing" on the merits that Section 405 contemplates satisfies the requirement that SSA's decision be made "after a hearing" in order to be subject to judicial review. 42 U.S.C. 405(g). Compare, *e.g.*, *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 69-70 (6th Cir. 1993) (holding judicial review of dismissal of request for ALJ hearing is not available because no "hearing" has occurred) (citation and emphasis omitted), with *Boley* v. *Colvin*, 761 F.3d 803, 806 (7th Cir. 2014) (holding review is available even where an ALJ decides "not to hold an oral hearing").

Although an oral hearing took place before an ALJ in this case and the issue accordingly is not directly presented here, the logic of this Court's precedents suggests that, where an ALJ hearing has been requested but the ALJ has dismissed the request as untimely—or where the ALJ has determined that an oral hearing is unnecessary for the agency to conclusively resolve a claim for benefits—the "after a hearing" condition is not a barrier to judicial review, limited to the grounds on which the agency's decision was based. 42 U.S.C. 405(g); see *Salfi*, 422 U.S. at 767 (review is available under Section 405(g) where SSA forgoes a hearing on issues "as to which [the Commissioner] considers a hearing to be useless"). A contrary interpretation of Section 405(g) would, again, leave the claimant "permanently in limbo" without an opportunity to access his statutory right to judicial review. *Bloodsworth*, 703 F.2d at 1239.

3. The court of appeals below adopted the Eighth Circuit's view that an Appeals Council dismissal on untimeliness grounds is not final because it "does not address the merits of the claim" for benefits. Pet. App. 7a (quoting *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985)). But this case, like *Smith*, is not about judicial review of the merits of petitioner's claim for benefits; petitioner is limited by Section 405(g) to judicial review of the Appeals Council's determination regarding his conformity with SSA's timeliness regulation. Petitioner presented that question to the agency and pursued it as far as he could, Pet. App. 3a-4a; the Appeals Council unambiguously addressed it, see J.A. 41-42; and the Appeals Council's conclusion on the point "is binding and not subject to further review," 20 C.F.R. 416.1472.

Section 405(g) does not limit judicial review to cases in which the most recent agency ruling addressed the underlying merits. And as explained above, when courts have confronted similar agency decisions in other contexts finding that a plaintiff failed to properly exhaust administrative remedies, courts have not suggested that a ruling on the underlying merits is necessary in order to render the agency's decision "final" and subject to review on whether the plaintiff did fail to exhaust administrative remedies. See pp. 30-31, *supra*.

4. The court below, like other courts of appeals, also found support for its position in the "rationale" of this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977). Pet. App. 6a; see also, *e.g.*, *Matlock*, 908 F.2d at 493-494. But *Sanders* involved a different question.

In *Sanders*, this Court held that SSA's denial of a request to reopen a prior final decision was not subject to judicial review under Section 405(g). 430 U.S. at 108. The Court explained that "the opportunity to reopen

final decisions * * * [is] afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* The Court further reasoned that "allow[ing] a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [Section 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Ibid.* "In other words, one opportunity for judicial review is enough," and "a claimant who bypasses that chance cannot create another by a procedure that would evade a statutory deadline." *Boley*, 761 F.3d at 807.

That is not what happened here. As the Eleventh Circuit has explained, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. Reopening "is an extraordinary measure, affording the opportunity of a second excursion through the decision making process." *Id.* at 1238. In contrast, review by the Appeals Council is "a normal stage in the administrative review procedure, available as of right to any party." *Id.* at 1237; see 20 C.F.R. 416.1400(a)(4). It is not "a bonus opportunity" for review after the ordinary process of administrative review has been completed, but part of that administrative-review process. 703 F.2d at 1238. And it is the part of the process that immediately precedes the claimant's ability to exercise his right to judicial review. 20 C.F.R. 416.1400(a)(4)-(5). Although the Eighth Circuit has stated that "the Appeals Council's discretionary action in hearing an *untimely* request for review is as much a 'bonus opportunity' as is reopening," *Smith*, 761 F.2d at 519 (emphasis added), that reasoning merely assumes

the result of the very issue that petitioner seeks to raise before the court in this case: whether the Appeals Council erred in finding that his request for review was untimely.

Contrary to the court of appeals' reasoning below, judicial review in this case is not inconsistent with Congress's "purpose * * * to impose a 60-day limitation upon judicial review," Pet. App. 6a (quoting *Sanders*, 430 U.S. at 108), because there is no dispute that petitioner filed his complaint in court within the 60 days required by the statute. Nor would judicial review here involve "repetitive or belated litigation of stale eligibility claims." *Matlock*, 908 F.2d at 494 (quoting *Sanders*, 430 U.S. at 108). Again, the question for the district court to resolve is whether petitioner's claim for benefits remained timely, as opposed to stale, in the administrative process.

5. The court of appeals below, like other courts to address the issue, relied on SSA's regulations stating that an Appeals Council dismissal of a request for review as untimely is not subject to judicial review. Pet. App. 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, 416.1472); see also 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request to extend the time to request review of a determination or a decision is "not subject to judicial review"); 64 Fed. Reg. at 57,689 (stating that "an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" and thus "is not judicially reviewable").

This Court has recognized that, because the Social Security Act does not define the term "'final decision,'" and because 42 U.S.C. 405(a) grants the Commissioner authority to adopt regulations setting out necessary and

appropriate procedures to conduct administrative review of benefits applications, the meaning of the term "'final decision'" is largely "left to the [Commissioner] to flesh out by regulation." *Salfi*, 422 U.S. at 766 (citation omitted). But the regulations adopted by the agency must be "not inconsistent with the provisions of" the Act. 42 U.S.C. 405(a). As described above, Congress has directed SSA to provide for a "hearing" and reach a "decision" on each benefits application, 42 U.S.C. 405(b)(1); it has conferred a right to judicial review of the agency's "final decision," 42 U.S.C. 405(g); and it has specified what form of judicial review is permitted when the agency's adverse decision is based on the claimant's procedural non-compliance, *ibid.* A regulation that attempts to label the agency's last word on a benefits application as something other than a "final decision," that suggests the agency will never issue a final decision on that application, and that deprives the claimant of his statutory right to judicial review altogether for missing an administrative deadline, is inconsistent with the Act and thus beyond the authority conferred on the agency by Section 405(a).

To be sure, Section 405(a) grants the Commissioner discretion to "specify such requirements for exhaustion as [she] deems serve [her] own interests in effective and efficient administration." *Salfi*, 422 U.S. at 766. SSA is thereby empowered to establish the steps in the administrative-review process that a claimant must pursue, to say by when he must pursue them, and to determine when its own review is complete so that judicial review may be sought. See, *e.g.*, *Bowen* v. *Yuckert*, 482 U.S. 137, 145 (1987) (upholding SSA's regulation requiring disability claimants to make a threshold showing of the severity of their disability). But it does not follow from

the agency's discretion to adopt procedural exhaustion requirements that SSA has authority to reserve for itself alone the question whether petitioner complied with those requirements. See *Bloodsworth*, 703 F.2d at 1239. In any particular case, SSA does generally have discretion whether to continue considering a particular claim for benefits, or instead to terminate its consideration, make its ruling binding, and allow judicial review. But once the Appeals Council decided to dismiss petitioner's request for review and made clear that it would take no further action on petitioner's benefits claim, the Act made the Commissioner's final decision subject to judicial review. The agency cannot alter that result by regulation.

6. Finally, the court of appeals here expressed the view, adopting the reasoning of the Eighth Circuit, that if Appeals Council dismissal orders are judicially reviewable, then "the Secretary's orderly procedures for processing disability claims mean little or nothing," because a claimant could "avoid the timely exhaustion of remedies requirement" and "could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision." Pet. App. 7a-8a (quoting *Smith*, 761 F.2d at 518). That reasoning is unpersuasive in several respects.

In the first place, petitioner claims that he did not "avoid" the agency's exhaustion requirement, Pet. App. 8a (citation omitted), because he alleges that he attempted to properly exhaust his administrative remedies by submitting a timely request for Appeals Council review. J.A. 46. And because petitioner is limited by 42 U.S.C. 405(g) to judicial review only of his conformity with the agency's regulatory procedures, judicial review here would not involve a "belated[ ] appeal * * *

of [the] ALJ's decision." Pet. App. 8a (citation omitted). As explained above, if a court were to determine that the Appeals Council erred in finding petitioner's request for review to be untimely, the court would remand to allow further review of the merits by the Appeals Council but would not review the ALJ's decision itself. See pp. 29-30, *supra*.

Judicial review here also does not threaten "the [agency's] orderly procedures for processing disability claims." Pet. App. 8a (citation omitted). Adherence to those procedures is indeed critical for managing the more than two million claims for benefits that SSA receives each year. See SSA, *Annual Performance Report Fiscal Years 2017–2019*, at 33 (Feb. 12, 2018).[16] Of those, thousands are dismissed each year for failure to adhere to a regulatory timing requirement.[17] But because of the limitations the statute places on judicial review, very few claimants who receive a dismissal order will have a plausible basis to ask a court to overturn the agency's decision.

As mentioned above, the Appeals Council's factual finding regarding whether a claimant submitted a timely request for Appeals Council review will be reviewed deferentially—the agency's factual finding must be sustained if supported by "substantial evidence." 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."); see also *Richardson* v.

---

[16] https://www.ssa.gov/budget/FY19Files/2019APR.pdf.

[17] This Office has been informed that, in Fiscal Year 2017, the Appeals Council dismissed approximately 2500 requests for review as untimely, and ALJs dismissed approximately 6000 hearing requests as untimely.

Perales, 402 U.S. 389, 401 (1971) ("[S]ubstantial evidence" in Section 405(g) refers to "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). That standard of review for agency factfinding is even more deferential than the "clearly erroneous" standard that applies to review of a trial court's "findings of fact." *Dickinson* v. *Zurko*, 527 U.S. 150, 152-153 (1999); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483-484 (1992) ("[T]o obtain judicial reversal of the [agency's] determination, [the plaintiff] must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite [fact]."). And where the agency's determination that a claimant did not timely request review is supported by substantial evidence, a court would review the agency's decision not to excuse the untimely filing at most for abuse of discretion. See *City of New York*, 476 U.S. at 483 ("Ordinarily, the Secretary has discretion to decide when to waive the exhaustion requirement."); see also, *e.g.*, *Loyd* v. *Sullivan*, 882 F.2d 218, 219 (7th Cir. 1989) (per curiam) (noting that "the decision to grant an extension rests within the discretion of the Secretary" and reviewing the decision for abuse of discretion).

It should be a rare case in which a claimant can plausibly maintain that SSA's finding of untimeliness is not supported by substantial evidence, or that SSA abused its discretion in refusing to grant a good-cause exception. But if such a case arises—perhaps because of compelling evidence of a timely submission, or a clear misapplication of the regulatory definition of "good cause"

for extending the time to request review—then there is no sound basis for denying judicial review.

In this case, the record gives reasons to doubt that petitioner will ultimately be able to overturn the agency's finding of untimeliness, as discussed by the court of appeals and the district court while considering petitioner's "Due Process" claim. See Pet. App. 25a-26a, 8a-13a. But the courts' treatment of that issue illustrates another problematic consequence of the interpretation of Section 405(g) adopted by the majority of courts of appeals: it causes claimants to recast ordinary disputes over timeliness as "constitutional challenge[s]." *Eldridge*, 424 U.S. at 330; see, *e.g.*, *Dexter* v. *Colvin*, 731 F.3d 977, 980-981 (9th Cir. 2013); *Callender* v. *SSA*, 275 Fed. Appx. 174, 176 (3d Cir. 2008) (per curiam). As the Seventh Circuit recently observed, construing 42 U.S.C. 405(g) in a way that "forces courts to resolve constitutional questions unnecessarily, while bypassing statutes, regulations, and principles of administrative law that might suffice to decide the case, has nothing to recommend it." *Boley*, 761 F.3d at 808. There is no reason for courts to re-conceptualize garden-variety claims alleging administrative error as deprivations of constitutional rights, especially when the Act itself provides a framework for judicial review of adverse decisions that are based on a finding of a procedural failure by the claimant. See 42 U.S.C. 405(g).

Rather than grant a motion to dismiss in this case, the district court should have denied that motion and then undertaken the limited form of judicial review called for by the statutory text.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
CHARLES W. SCARBOROUGH
SARAH CARROLL
Attorneys

DECEMBER 2018

APPENDIX

1. 42 U.S.C. 405 provides in pertinent part:

Evidence, procedure, and certification for payments

(a) Rules and regulations; procedures

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

(b) Administrative determination of entitlement to benefits; findings of fact; hearings; investigations; evidentiary hearings in reconsiderations of disability benefit terminations; subsequent applications

(1) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, surviving

divorced father, husband, divorced husband, widower, surviving divorced husband, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Commissioner of Social Security has rendered, the Commissioner shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision. Any such request with respect to such a decision must be filed within sixty days after notice of such decision is received by the individual making such request. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedure.

(2) In any case where—

(A) an individual is a recipient of disability insurance benefits, or of child's, widow's, or widower's insurance benefits based on disability,

(B) the physical or mental impairment on the basis of which such benefits are payable is found to

have ceased, not to have existed, or to no longer be disabling, and

(C) as a consequence of the finding described in subparagraph (B), such individual is determined by the Commissioner of Social Security not to be entitled to such benefits,

any reconsideration of the finding described in subparagraph (B), in connection with a reconsideration by the Commissioner of Social Security (before any hearing under paragraph (1) on the issue of such entitlement) of the Commissioner's determination described in subparagraph (C), shall be made only after opportunity for an evidentiary hearing, with regard to the finding described in subparagraph (B), which is reasonably accessible to such individual. Any reconsideration of a finding described in subparagraph (B) may be made either by the State agency or the Commissioner of Social Security where the finding was originally made by the State agency, and shall be made by the Commissioner of Social Security where the finding was originally made by the Commissioner of Social Security. In the case of a reconsideration by a State agency of a finding described in subparagraph (B) which was originally made by such State agency, the evidentiary hearing shall be held by an adjudicatory unit of the State agency other than the unit that made the finding described in subparagraph (B). In the case of a reconsideration by the Commissioner of Social Security of a finding described in subparagraph (B) which was originally made by the Commissioner of Social Security, the evidentiary hearing shall be held by a person other

than the person or persons who made the finding described in subparagraph (B).

(3)(A) A failure to timely request review of an initial adverse determination with respect to an application for any benefit under this subchapter or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any benefit under this subchapter if the applicant demonstrates that the applicant, or any other individual referred to in paragraph (1), failed to so request such a review acting in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by any officer or employee of the Social Security Administration or any State agency acting under section 421 of this title.

(B) In any notice of an adverse determination with respect to which a review may be requested under paragraph (1), the Commissioner of Social Security shall describe in clear and specific language the effect on possible entitlement to benefits under this subchapter of choosing to reapply in lieu of requesting review of the determination.

* * * * *

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mail-

ing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it

may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

(h) Finality of Commissioner's decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No

action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

* * * * *

2. 42 U.S.C. 1383(c) provides:

Procedure for payment of benefits

(c) **Hearing to determine eligibility or amount of benefits; subsequent application; time within which to request hearing; time for determinations of Commissioner pursuant to hearing; judicial review**

(1)(A) The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. The Commissioner of Social Security shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eligible individual or eligible spouse and is in disagreement with any determination under this subchapter with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disa-

greement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse the Commissioner's findings of fact and such decision. The Commissioner of Social Security is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, the Commissioner may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under the rules of evidence applicable to court procedure. The Commissioner of Social Security shall specifically take into account any physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language) in determining, with respect to the eligibility of such individual for benefits under this subchapter, whether such individual acted in good faith or was at fault, and in determining fraud, deception, or intent.

(B)(i) A failure to timely request review of an initial adverse determination with respect to an application for any payment under this subchapter or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any payment under this subchapter if the applicant demonstrates that the applicant, or any other individual referred to in subparagraph (A), failed to so request such a review acting in good

faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for payments in lieu of seeking review of an adverse determination, provided by any officer or employee of the Social Security Administration or any State agency acting under section 421 of this title.

(ii) In any notice of an adverse determination with respect to which a review may be requested under subparagraph (A), the Commissioner of Social Security shall describe in clear and specific language the effect on possible eligibility to receive payments under this subchapter of choosing to reapply in lieu of requesting review of the determination.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1382c(a)(3) of this title), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

3. 20 C.F.R. 416.1400 provides:

Introduction.

(a) *Explanation of the administrative review process.* This subpart explains the procedures we follow in determining your rights under title XVI of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) *Initial determination.* This is a determination we make about your eligibility or your continuing eligibility for benefits or about any other matter, as discussed in § 416.1402, that gives you a right to further review.

(2) *Reconsideration.* If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) *Hearing before an administrative law judge.* If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) *Appeals Council review.* If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) *Federal court review.* When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatis-

fied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) *Expedited appeals process.* At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) *Nature of the administrative review process.* In making a determination or decision in your case, we conduct the administrative review process in an informal, non-adversarial manner. Subject to certain timeframes at the hearing level (see § 416.1435) and the limitations on Appeals Council consideration of additional evidence (see § 416.1470), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

4. 20 C.F.R. 416.1403(a) provides in pertinent part:

Administrative actions that are not initial determinations.

(a) Administrative actions that are not initial determinations may be reviewed by us, but they are not subject to the administrative review process provided by this subpart and they are not subject to judicial review. These actions include, but are not limited to, an action about—

* * * * *

(8) Denying your request to extend the time period for requesting review of a determination or a decision;

* * * * *

5. 20 C.F.R. 416.1405 provides:

Effect of an initial determination.

An initial determination is binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

6. 20 C.F.R. 416.1409 provides:

How to request reconsideration.

(a) We shall reconsider an initial determination if you or any other party to the reconsideration files a written request at one of our offices within 60 days after the date you receive notice of the initial determination (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) *Extension of time to request a reconsideration.* If you want a reconsideration of the initial determination but do not request one in time, you may ask us for more time to request a reconsideration. Your request for an extension of time must be in writing and it must give the reasons why the request for reconsideration was not filed within the stated time period. If you show us that you had good cause for missing the deadline, we will extend the time period. To determine whether good cause exists, we use the standards explained in § 416.1411.

7. 20 C.F.R. 1411 provides:

Good cause for missing the deadline to request review.

(a) In determining whether you have shown that you have good cause for missing a deadline to request review we consider—

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and

(4) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

(b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

(1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

(2) There was a death or serious illness in your immediate family.

(3) Important records were destroyed or damaged by fire or other accidental cause.

(4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.

(5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested reconsideration or a hearing, or within 30 days of receiving the explanation you requested Appeals Council review or filed a civil suit.

(6) We gave you incorrect or incomplete information about when and how to request administrative review or to file a civil suit.

(7) You did not receive notice of the initial determination or decision.

(8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.

(9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known of the need to file timely, or which prevented you from filing timely.

8. 20 C.F.R. 416.1421 provides:

Effect of a reconsidered determination.

The reconsidered determination is binding unless—

(a) You or any other party to the reconsideration requests a hearing before an administrative law judge within the stated time period and a decision is made;

(b) The expedited appeals process is used; or

(c) The reconsidered determination is revised.

9. 20 C.F.R. 416.1433 provides:

How to request a hearing before an administrative law judge.

(a) *Written request.* You may request a hearing by filing a written request. You should include in your request—

(1) Your name and social security number;

(2) The name and social security number of your spouse, if any;

(3) The reasons you disagree with the previous determination or decision;

(4) A statement of additional evidence to be submitted and the date you will submit it; and

(5) The name and address of any designated representative.

(b) *When and where to file.* The request must be filed at one of our offices within 60 days after the date you receive notice of the previous determination or decision (or within the extended time period if we extend the time as provided in paragraph (c) of this section).

(c) *Extension of time to request a hearing.* If you have a right to a hearing but do not request one in time, you may ask for more time to make your request. The request for an extension of time must be in writing and it must give the reasons why the request for a hearing was not filed within the stated time period. You may file your request for an extension of time at one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

10. 20 C.F.R. 416.1455 provides:

The effect of an administrative law judge's decision.

The decision of the administrative law judge is binding on all parties to the hearing unless—

(a) You or another party request a review of the decision by the Appeals Council within the stated time period, and the Appeals Council reviews your case;

(b) You or another party requests a review of the decision by the Appeals Council within the stated time period, the Appeals Council denies your request for review, and you seek judicial review of your case by filing an action in a Federal district court;

(c) The decision is revised by an administrative law judge or the Appeals Council under the procedures explained in § 416.1487;

(d) The expedited appeals process is used;

(e) The decision is a recommended decision directed to the Appeals Council; or

(f) In a case remanded by a Federal court, the Appeals Council assumes jurisdiction under the procedures in § 416.1484.

11. 20 C.F.R. 416.1457 provides:

Dismissal of a request for a hearing before an administrative law judge.

An administrative law judge may dismiss a request for a hearing under any of the following conditions:

(a) At any time before notice of the hearing decision is mailed, you or the party or parties that requested the hearing ask to withdraw the request. This request may be submitted in writing to the administrative law judge or made orally at the hearing.

(b)(1)(i) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and you have been notified before the time set for the hearing that your request

for a hearing may be dismissed without further notice if you did not appear at the time and place of hearing, and good cause has not been found by the administrative law judge for your failure to appear; or

(ii) Neither you nor the person you designate to act as your representative appears at the time and place set for the hearing and within 10 days after the administrative law judge mails you a notice asking why you did not appear, you do not give a good reason for the failure to appear.

(2) In determining good cause or good reason under this paragraph, we will consider any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

(c) The administrative law judge decides that there is cause to dismiss a hearing request entirely or to refuse to consider any one or more of the issues because—

(1) The doctrine of *res judicata* applies in that we have made a previous determination or decision under this subpart about your rights on the same facts and on the same issue or issues, and this previous determination or decision has become final by either administrative or judicial action;

(2) The person requesting a hearing has no right to it under § 416.1430;

(3) You did not request a hearing within the stated time period and we have not extended the time for requesting a hearing under § 416.1433(c); or

(4) You die, there are no other parties, and we have no information to show that you may have a survivor who may be paid benefits due to you under § 416.542(b) and who wishes to pursue the request for hearing, or that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act. The administrative law judge, however, will vacate a dismissal of the hearing request if, within 60 days after the date of the dismissal:

(i) A person claiming to be your survivor, who may be paid benefits due to you under § 416.542(b), submits a written request for a hearing, and shows that a decision on the issues that were to be considered at the hearing may adversely affect him or her; or

(ii) We receive information showing that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act.

12. 20 C.F.R. 416.1459 provides:

Effect of dismissal of a request for a hearing before an administrative judge.

The dismissal of a request for a hearing is binding, unless it is vacated by an administrative law judge or the Appeals Council.

13. 20 C.F.R. 416.1460 provides:

Vacating a dismissal of a request for a hearing before an administrative law judge.

(a) Except as provided in paragraph (b) of this section, an administrative law judge or the Appeals Council may vacate a dismissal of a request for a hearing if you request that we vacate the dismissal. If you or another party wish to make this request, you must do so within 60 days of the date you receive notice of the dismissal, and you must state why our dismissal of your request for a hearing was erroneous. The administrative law judge or Appeals Council will inform you in writing of the action taken on your request. The Appeals Council may also vacate a dismissal of a request for a hearing on its own motion. If the Appeals Council decides to vacate a dismissal on its own motion, it will do so within 60 days of the date we mail the notice of dismissal and will inform you in writing that it vacated the dismissal.

(b) If you wish to proceed with a hearing after you received a fully favorable revised determination under the prehearing case review process in § 416.1441, you must follow the procedures in § 416.1441(d) to request that an administrative law judge vacate his or her order dismissing your request for a hearing.

14. 20 C.F.R. 416.1467 provides:

Appeals Council review—general.

If you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action. The Appeals Council may deny or dismiss the request for review, or it may grant the request and either issue a decision or remand the case to an administrative law judge. The Appeals Council shall notify the parties at their last known address of the action it takes.

15. 20 C.F.R. 416.1468 provides:

How to request Appeals Council review.

(a) *Time and place to request Appeals Council review.* You may request Appeals Council review by filing a written request. You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. You may file your request at one of our offices within 60 days after the date you receive notice of the hearing decision or dismissal (or within the extended time period if we extend the time as provided in paragraph (b) of this section).

(b) *Extension of time to request review.* You or any party to a hearing decision may ask that the time for filing a request for the review be extended. The request for an extension of time must be in writing. It must be filed with the Appeals Council, and it must give

the reasons why the request for review was not filed within the stated time period. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

16. 20 C.F.R. 416.1471 provides:

Dismissal by Appeals Council.

The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended. The Appeals Council may also dismiss any proceedings before it if—

(a) You and any other party to the proceedings files a written request for dismissal; or

(b) You die, there are no other parties, and we have no information to show that you may have a survivor who may be paid benefits due to you under § 416.542(b) and who wishes to pursue the request for review, or that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act. The Appeals Council, however, will vacate a dismissal of the request for review if, within 60 days after the date of the dismissal:

(1) A person claiming to be your survivor, who may be paid benefits due to you under § 416.542(b), submits a written request for review, and shows that a decision on the issues that were to be considered on review may adversely affect him or her; or

(2) We receive information showing that you authorized interim assistance reimbursement to a State pursuant to section 1631(g) of the Act.

17. 20 C.F.R. 416.1472 provides:

Effect of dismissal of request for Appeals Council review.

The dismissal of a request for Appeals Council review is binding and not subject to further review.

18. 20 C.F.R. 416.1481 provides:

Effect of Appeals Council's decision or denial of review.

The Appeals Council may deny a party's request for review or it may decide to review a case and make a decision. The Appeals Council's decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised. You may file an action in a Federal district court within 60 days after the date you receive notice of the Appeals Council's action.

19. 20 C.F.R. 416.1482 provides:

Extension of time to file action in Federal district court.

Any party to the Appeals Council's decision or denial of review, or to an expedited appeals process agreement, may request that the time for filing an action in a Federal district court be extended. The request must be in writing and it must give the reasons why the

action was not filed within the stated time period. The request must be filed with the Appeals Council, or if it concerns an expedited appeals process agreement, with one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause exists, we use the standards explained in § 416.1411.

No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
CHARLES W. SCARBOROUGH
SARAH CARROLL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide various monetary benefits to certain eligible individuals. The Act directs the Commissioner of Social Security to adjudicate applications for benefits, and it authorizes judicial review of "any final decision of the Commissioner of Social Security made after a hearing to which [the plaintiff] was a party." 42 U.S.C. 405(g); see 42 U.S.C. 1383(c)(3). Petitioner filed an application for supplemental-security-income benefits under Title XVI of the Act, 42 U.S.C. 1381 *et seq.*, and an administrative law judge (ALJ) denied petitioner's claim after a hearing. Petitioner filed a request for review of the ALJ's decision with SSA's Appeals Council. The Appeals Council dismissed petitioner's request for review, finding that it was untimely under an SSA regulation and that petitioner had not shown good cause for missing the deadline. See 20 C.F.R. 416.1468(a) and (b). SSA's regulations provide that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review," 20 C.F.R. 416.1472, and that in such circumstances the ALJ's decision "is binding on all parties," 20 C.F.R. 416.1455. The question presented is:

Whether a decision of the Appeals Council dismissing as untimely a request for review of a decision issued by an ALJ after a hearing is a "final decision of the Commissioner of Social Security made after a hearing" that is subject to judicial review under 42 U.S.C. 405(g).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 14
Conclusion 32

TABLE OF AUTHORITIES

Cases:

Adams v. *Heckler*, 799 F.2d 131 (4th Cir. 1986) 13, 28
Athens Cmty. Hosp., Inc. v. *Schweiker*, 686 F.2d 989 (D.C. Cir. 1982), modified on reh'g, 743 F.2d 1 (D.C. Cir. 1984) 21
Auburn Reg'l Med. Ctr. v. *Sebelius*, 642 F.3d 1145 (D.C. Cir. 2011), rev'd on other grounds, 568 U.S. 145 (2013) 21
Bacon v. *Sullivan*, 969 F.2d 1517 (3d Cir. 1992) 13, 26
Bennett v. *Spear*, 520 U.S. 154 (1997) 19
Bloodsworth v. *Heckler*, 703 F.2d 1233 (11th Cir. 1983) 13, 20, 22, 23, 24, 27
Boley v. *Colvin*, 761 F.3d 803 (7th Cir. 2014) ... 17, 23, 26, 31
Bowen v. *Galbreath*, 485 U.S. 74 (1988) 2
Brandtner v. *Department of Health & Human Servs.*, 150 F.3d 1306 (10th Cir. 1998) 13, 26
Califano v. *Sanders*, 430 U.S. 99 (1977) 7, 12, 16
Callender v. *SSA*, 275 Fed. Appx. 174 (3d Cir. 2008) 30
Casey v. *Berryhill*, 853 F.3d 322 (7th Cir. 2017) 13, 20, 25, 26, 28
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 19
Cox v. *Benefits Review Bd.*, 791 F.2d 445 (6th Cir. 1986) 21

Cases—Continued: Page

Dexter v. *Colvin*, 731 F.3d 977 (9th Cir. 2013) 30
Dickinson v. *Zurko*, 527 U.S. 150 (1999) 24
Dietsch v. *Schweiker*, 700 F.2d 865 (2d Cir. 1983) 13, 27
Dillow v. *Sullivan*,
952 F.2d 1396, 1992 WL 6810 (1992) (Tbl.) 28
Farzana K. v. *Indiana Dep't of Educ.*,
473 F.3d 703 (7th Cir. 2007) 21
Harper ex rel. Harper v. *Bowen*,
813 F.2d 737 (5th Cir.), cert. denied,
484 U.S. 969 (1987) 13, 26
Hilmes v. *Secretary of Health & Human Servs.*,
983 F.2d 67 (6th Cir. 1993) 12, 17, 26
ICC v. *Brotherhood of Locomotive Eng'rs*,
482 U.S. 270 (1987) 20
Khan v. *United States Dep't of Justice*,
494 F.3d 255 (2d Cir. 2007) 21
Loya v. *Desert Sands Unified Sch. Dist.*,
721 F.2d 279 (9th Cir. 1983) 21
Lyng v. *Northwest Indian Cemetery Protective*
Ass'n, 485 U.S. 439 (1988) 31
Magwood v. *Patterson*, 561 U.S. 320 (2010) 18
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 16, 17
Matlock v. *Sullivan*, 908 F.2d 492 (9th Cir. 1990) 13, 26
Port of Bos. Marine Terminal Ass'n v.
Rederiaktiebolaget Transatlantic,
400 U.S. 62 (1970) 19
Republic of Arg. v. *Weltover, Inc.*,
504 U.S. 607, (1992) 18
Richardson v. *Perales*, 402 U.S. 389 (1971) 24
Rothman v. *Secretary of Health & Human Servs.*,
70 F.3d 110, 1994 WL 866086
(1st Cir. Dec. 8, 1994) (Tbl.) 26

Cases—Continued: Page

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 24
Sackett v. *EPA*, 566 U.S. 120 (2012) 19
Shalala v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) 16
Sheehan v. *Secretary of Health, Educ. & Welfare*, 593 F.2d 323 (8th Cir. 1979) 25
Sims v. *Apfel*, 530 U.S. 103 (2000) 18, 21
Smith v. *Heckler*, 761 F.2d 516 (8th Cir. 1985) 13, 14, 26
Stone v. *Heckler*, 778 F.2d 645 (11th Cir. 1985) 27
Taniguchi v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560 (2012) 18
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 7, 16, 21, 22
Woodford v. *Ngo*, 548 U.S. 81 (2006) 24

Constitution, statutes, regulations, and rule:

U.S. Const. Amend. V 11
Administrative Procedure Act:
ch. 324, 60 Stat. 237 20
5 U.S.C. 704 19
Social Security Act, 42 U.S.C. 301 *et seq.* 2
Tit. II, 42 U.S.C. 401 *et seq.* 2
42 U.S.C. 405(a) 3, 21
42 U.S.C. 405(b)(1) 2, 3, 4, 13, 15
42 U.S.C. 405(g) (Supp. V 1939) 20
42 U.S.C. 405(g) ..... *passim*
42 U.S.C. 405(h) 3, 13
Tit. XVI, 42 U.S.C. 1381 *et seq.* 2
42 U.S.C. 1383(c)(1)(A) ..... *passim*
42 U.S.C. 1383(c)(3) 3, 16
42 U.S.C. 1383(d)(1) 3
42 U.S.C. 1395ff(b)(1)(A) 29

Statutes, regulations, and rule—Continued: Page

Social Security Act Amendments of 1939, ch. 666, Tit. II, § 201, sec. 205(g), 53 Stat. 1370-1371 20
28 U.S.C. 1291 21
28 U.S.C. 1331 15
28 U.S.C. 1346 (2012 & Supp. V 2017) 15
20 C.F.R.:
Sections 404.900 *et seq.* 4
Section 404.952(c) (1961) 7
Section 416.1400 4
Section 416.1400(a)(1) 4
Section 416.1400(a)(2) 4
Section 416.1400(a)(3) 4
Section 416.1400(a)(4) 5
Section 416.1400(a)(5) 6, 12, 21
Section 416.1403(a)(8) 7
Section 416.1404(a) 4
Section 416.1405 4
Section 416.1411 ..... 4, 6
Sections 416.1413-416.1422 4
Section 416.1421 5
Sections 416.1423-416.1428 7
Section 416.1424(a) 7
Section 416.1424(d) 7
Section 416.1425(a) 7
Sections 416.1429-416.1433 4
Section 416.1433(b) 4
Section 416.1433(c) 4, 5
Section 416.1446 5
Section 416.1448 5
Sections 416.1449-416.1453 5
Section 416.1453(d) 5

Regulations and rule—Continued: Page

Section 416.1455 ..... 6, 19
Section 416.1457(c)(3) 5, 17
Section 416.1459 5
Section 416.1460(a) 5
Section 416.1467 ..... 5, 6
Section 416.1468(a) 5, 10
Section 416.1468(b) 6
Section 416.1469 6
Section 416.1470 (2014) 6
Section 416.1470 (2018) 6
Section 416.1471 ..... 6, 9, 12, 21
Section 416.1472 (1982) 27
Section 416.1472 ..... *passim*
Section 416.1479 6
Section 416.1481 (1982) 27
Section 416.1481 6
Section 416.1487 7
Sections 416.1488-416.1489 7
42 C.F.R. 405.1116 29
SSAR 99-4(11), 64 Fed. Reg. 57,687 (Oct. 26, 1999) 7, 29
SSAR 16-1(7), 81 Fed. Reg. 13,438 (Mar. 14, 2016) 5
Fed. R. Civ. P. 59(e) 12

Miscellaneous:

25 Fed. Reg. 1677 (Feb. 26, 1960) 7
45 Fed. Reg. 52,078 (Aug. 5, 1980) 7
Webster's New Int'l Dictionary of the English Language (2d ed. 1949) 18

In the Supreme Court of the United States

No. 17-1606

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 813. The orders of the district court granting respondent's motion to dismiss (Pet. App. 22a-26a) and denying petitioner's subsequent motion for relief under Federal Rule of Civil Procedure 59(e) (Pet. App. 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 2018. On April 19, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including May 25, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. *Statutory framework.* The Social Security Act, 42 U.S.C. 301 *et seq.*, authorizes the Social Security Administration (SSA) to provide monetary benefits to certain eligible individuals under Titles II and XVI of the Act. Title II, 42 U.S.C. 401 *et seq.*, establishes an "insurance program" that "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Bowen* v. *Galbreath*, 485 U.S. 74, 75 (1988). Title XVI, 42 U.S.C. 1381 *et seq.*, establishes a separate social "welfare program" that provides supplemental-security-income benefits "to financially needy individuals who are aged, blind, or disabled regardless of their insured status." *Galbreath*, 485 U.S. at 75.

When benefits are sought under either program, the Act directs the Commissioner of Social Security "to make findings of fact, and decisions as to the right of any individual applying for a payment." 42 U.S.C. 405(b)(1) (Title II); see 42 U.S.C. 1383(c)(1)(A) (Title XVI). The Act establishes certain minimum procedural requirements that the Commissioner must observe in adjudicating applications for benefits. For example, if the Commissioner renders a decision adverse to a claimant, the decision must contain (*inter alia*) an explanation of the Commissioner's reasons, and upon request the Commissioner must provide the claimant notice and an opportunity for a hearing for review of that decision. See *ibid.*

The Act also provides that a final decision made after a hearing is subject to judicial review. 42 U.S.C. 405(g). Section 405(g) provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action" in federal district court "commenced within sixty days after

the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." *Ibid.* (Title II proceedings); see 42 U.S.C. 1383(c)(3) (making the Commissioner's "final determination[s]" regarding supplemental-security-income benefits under Title XVI "subject to judicial review as provided in section 405(g) of [Title 42] to the same extent as the Commissioner's final determinations under section 405"). The Commissioner's findings and decision are "binding upon all individuals who were parties to such hearing" and may not be reviewed except as provided in the Act. 42 U.S.C. 405(h).

Subject to those and other requirements established by the Act itself, the Act grants SSA broad discretion to shape administrative procedures for adjudicating benefits applications under Titles II and XVI. The Act authorizes the Commissioner "to make rules and regulations and to establish procedures, not inconsistent with the provisions of th[e] [Act], which are necessary or appropriate to carry out" the Act's provisions. 42 U.S.C. 405(a); see 42 U.S.C. 1383(d)(1). The Commissioner is "further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper." 42 U.S.C. 405(b)(1), 1383(c)(1)(A).

b. *SSA administrative-review process.* Exercising those authorities, SSA has established a multi-step administrative process through which it adjudicates claims for

benefits. See 20 C.F.R. 416.1400.[1] At each step of the process, SSA's determination or decision generally becomes binding on the claimant unless the claimant pursues further review in accordance with SSA's regulations.

i. *Initial and reconsideration determinations.* A person who applies for benefits first receives an initial determination. 20 C.F.R. 416.1400(a)(1), 416.1404(a). If the claimant is dissatisfied with the initial determination, he or she can seek reconsideration. 20 C.F.R. 416.1400(a)(2). If the claimant does not timely seek reconsideration, the initial determination becomes binding. 20 C.F.R. 416.1405. If the claimant does timely request reconsideration, the agency will conduct further proceedings and render a reconsideration determination. See 20 C.F.R. 416.1413-416.1422.

ii. *ALJ hearing and decision.* If the claimant is dissatisfied with the reconsideration determination, he or she may then request a hearing before an administrative law judge (ALJ). 20 C.F.R. 416.1400(a)(3); see 20 C.F.R. 416.1429-416.1433. The request must be filed within 60 days of receipt of the reconsideration determination, unless the agency extends the deadline for good cause. 20 C.F.R. 416.1433(b) and (c); see 20 C.F.R. 416.1411 (considerations relevant to good-cause determination). If an ALJ hearing is timely requested, the ALJ will ordinarily conduct an oral hearing and receive additional

---

[1] Because this case involves supplemental-security-income benefits under Title XVI, this brief cites the regulatory provisions applicable to Title XVI cases. Parallel provisions exist for Title II benefits. See generally 20 C.F.R. 404.900 *et seq.* During the pendency of petitioner's claim for benefits and this litigation, the regulations have been modified in various respects not relevant to the issue presented in the petition. For simplicity and consistency, this brief refers to the regulatory provisions currently in force unless indicated otherwise.

submissions, and then the ALJ typically will issue a decision. See 20 C.F.R. 416.1446, 416.1449-416.1453; 20 C.F.R. 416.1448 (listing circumstances in which oral hearing may be waived). An ALJ may instead issue a recommended decision and transfer the case to the Appeals Council, 20 C.F.R. 416.1453(d), a body within SSA that reviews ALJ decisions, 20 C.F.R. 416.1467.

If instead a claimant submits an untimely request for an ALJ hearing and does not demonstrate "good cause for missing the deadline," 20 C.F.R. 416.1433(c), the ALJ will "dismiss" the hearing request. 20 C.F.R. 416.1457(c)(3). If the claimant believes that the ALJ's dismissal of a hearing request was erroneous, the regulations permit the claimant within 60 days to request that the ALJ or the Appeals Council vacate the ALJ's dismissal. 20 C.F.R. 416.1460(a). The ALJ or the Appeals Council also may vacate the dismissal *sua sponte*. *Ibid.* The regulations state that "[t]he dismissal of a request for a hearing is binding, unless it is vacated by an administrative law judge or the Appeals Council." 20 C.F.R. 416.1459. SSA has interpreted this regulation to mean that "an ALJ's order finding no good cause for a late hearing request and dismissing the request as untimely is not subject to judicial review." SSAR 16-1(7), 81 Fed. Reg. 13,438, 13,439 (Mar. 14, 2016). With exceptions not implicated here, unless the claimant seeks and obtains an ALJ hearing, the reconsideration determination is binding. 20 C.F.R. 416.1421.

iii. *Appeals Council review.* If a claimant is dissatisfied with an ALJ's decision, he or she may request review by the Appeals Council. 20 C.F.R. 416.1400(a)(4). To do so, the claimant must file a written request for review within 60 days after receiving notice of the ALJ's decision, unless the agency extends that deadline for good cause. 20 C.F.R.

416.1468(a) and (b); 20 C.F.R. 416.1411 (good-cause considerations). If the claimant timely requests review (or the untimely filing is excused), the Appeals Council may then either grant or deny review. 20 C.F.R. 416.1467, 416.1481; see 20 C.F.R. 416.1470 (2014) (setting forth criteria for cases Appeals Council will review); 20 C.F.R. 416.1470 (2018) (similar but establishing additional limitations on circumstances in which Appeals Council will consider new evidence); 20 C.F.R. 416.1469 (Appeals Council may also initiate review on its own motion).

If the Appeals Council grants review, it will subsequently either issue a decision on the merits of the claimant's claim or remand the case to the ALJ for further proceedings. 20 C.F.R. 416.1467, 416.1479. If the Council issues a decision and the claimant is dissatisfied with the decision, he or she may then seek judicial review by filing an action in federal court under 42 U.S.C. 405(g). 20 C.F.R. 416.1400(a)(5). Unless judicial review is sought, that decision becomes binding. 20 C.F.R. 416.1481. If the Appeals Council denies review, then the ALJ's decision becomes SSA's final decision, and the claimant may seek judicial review of SSA's final decision. See 20 C.F.R. 416.1400(a)(5). With exceptions not implicated here, if the Appeals Council denies review and judicial review of the ALJ's decision is not sought, the ALJ's decision becomes binding. 20 C.F.R. 416.1455, 416.1481.

If instead the claimant seeks Appeals Council review but does not file his or her request "within the stated period of time and the time for filing has not been extended," SSA's regulations have long provided that the Appeals Council "will dismiss [the] request for review." 20 C.F.R. 416.1471; see *ibid.* (Appeals Council also may dismiss request for review upon parties' request or death of claimant with no survivor or other parties); see also

25 Fed. Reg. 1677, 1682 (Feb. 26, 1960) (20 C.F.R. 404.952(c) (1961)). Since 1980, the regulations have further provided that "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. 416.1472; see 45 Fed. Reg. 52,078, 52,096, 52,104 (Aug. 5, 1980). SSA has interpreted this regulation to mean that "an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" and thus "is not judicially reviewable." SSAR 99-4(11), 64 Fed. Reg. 57,687, 57,689 (Oct. 26, 1999); see also 20 C.F.R. 416.1403(a)(8) (stating that a denial of a request to extend the time for seeking review is "not subject to the administrative review process" and is "not subject to judicial review").[2]

2. a. In 1987, petitioner filed an application for supplemental-security-income benefits under Title XVI on the basis of disability. Pet. App. 3a. In 1988, an ALJ

---

[2] SSA's regulations provide for two other forms of review in limited circumstances. First, the regulations establish an "expedited appeals process" for cases in which the claimant and SSA agree that "the only factor preventing a favorable" ruling for the claimant "is a provision in the law that [the claimant] believe[s] is unconstitutional." 20 C.F.R. 416.1424(d); see 20 C.F.R. 416.1423-416.1428; *cf. Weinberger* v. *Salfi*, 422 U.S. 749, 766-767 (1975) (discussing permissibility of dispensing with full exhaustion through Appeals Council in such circumstances). That procedure may be commenced at various points during the administrative-review process after issuance of a reconsideration determination until the Appeals Council has acted. See 20 C.F.R. 416.1424(a), 416.1425(a). Second, a claimant may request, or SSA on its own motion may choose, to reopen and revise a determination or decision even if the claimant did not timely request administrative review. 20 C.F.R. 416.1487; see 20 C.F.R. 416.1488-416.1489 (specifying deadlines and available grounds for seeking reopening); see also *Califano* v. *Sanders*, 430 U.S. 99, 104-109 (1977) (holding that denial of reopening is not judicially reviewable absent a constitutional claim). Neither of these alternative avenues for review is at issue here.

issued a favorable ruling, and petitioner began receiving benefits. *Ibid.* Those benefits continued until 2004, when they were terminated because petitioner's resources were found to be over the resource limit. *Ibid.*

b. i. In 2012, petitioner filed a new application for supplemental-security-income benefits, alleging that additional medical conditions had resulted from his original disability. Pet. App. 3a. In its initial determination, SSA denied petitioner's new application, and upon reconsideration SSA again denied his claim. *Ibid.*

Petitioner filed a timely request for a hearing before an ALJ. Pet. App. 3a. On February 18, 2014, an ALJ conducted a hearing on petitioner's application. *Id.* at 22a-23a. On March 26, 2014, the ALJ issued a decision (signed on his behalf by another ALJ) denying petitioner's application based on a finding that petitioner was not disabled within the meaning of the Social Security Act. *Id.* at 3a; D. Ct. Doc. 8-1, at 4-15 (Mar. 14, 2016). Pursuant to SSA's regulations, the notice of decision sent to petitioner advised him that he had 60 days to file a written appeal in order to obtain review by the Appeals Council and that an untimely appeal would be dismissed unless petitioner could "show [he] had a good reason for not filing it on time." D. Ct. Doc. 8-1, at 4; see 20 C.F.R. 416.1472.

ii. According to petitioner, on April 24, 2014—within the 60-day period for appealing—his counsel sent a letter via first-class U.S. mail to the Appeals Council requesting review. Pet. 6; see Pet. App. 3a-4a & n.1. Petitioner further alleges that, on September 21, 2014, his counsel sent a fax to SSA inquiring about the status of petitioner's request for Appeals Council review and attaching a copy of his April 24, 2014, letter requesting review. See *ibid.*; Pet. 6; see also D. Ct. Doc. 8-1, at 18-20 (letter

from petitioner's counsel dated April 24, 2014, requesting review); *id.* at 24 (fax cover sheet from petitioner's counsel dated September 21, 2014, referring to "appeal" "mailed to the Appeals Council" on April 24). Petitioner asserts (Pet. 6-7) that, on October 1, 2014, an SSA claims representative responded by letter to the September 21 fax from petitioner's counsel, stating that SSA had not received petitioner's April 24 letter requesting Appeals Council review. Petitioner contends (Pet. 7) that the claims representative mailed a completed request-for-review form for petitioner to the Appeals Council and informed petitioner that his appeal request was deemed filed as of October 1. See Pet. App. 3a-4a. Petitioner asserts (Pet. 7) that he also mailed to the Appeals Council a copy of his April 24 letter requesting review and a statement by his counsel affirming that the letter was sent on April 24.

SSA records, however, reflect that SSA did not receive either a letter sent by mail in April 2014 from petitioner's counsel requesting Appeals Council review, or a fax on September 21, 2014. Instead, an SSA official responsible for processing claims for Title XVI benefits in Kentucky stated in a sworn declaration that, based on her review of SSA's records, the first correspondence SSA received in petitioner's case following the ALJ's decision was a fax from petitioner on October 1, 2014, including an undated request-for-review form, a letter dated April 24, and a fax cover sheet dated September 21. See D. Ct. Doc. 8-1, at 3.

iii. On November 6, 2015, the Appeals Council issued an order dismissing petitioner's appeal as untimely under 20 C.F.R. 416.1471. Pet. App. 4a; see D. Ct. Doc. 8-1, at 25-28. The order stated that "[t]he request for review filed on October 1, 2014, was not filed within 60

days from the date notice of the decision was received as required by 20 C.F.R. 416.1468(a)." D. Ct. Doc. 8-1, at 27. The order explained that, although the deadline could be extended retroactively "if good cause is shown for missing the deadline," the Appeals Council "f[ound] that there is no good cause to extend the time for filing" here. *Ibid.* The order stated that "[petitioner's] representative submitted a good cause statement on October 1, 2014 indicating he had previously filed a brief on April 24, 2014"—apparently a reference to the letter requesting Appeals Council review that petitioner alleges his counsel sent on April 24—but that "[SSA] did not receive this brief before October 1, 2014," and petitioner's counsel had not "supplied evidence indicating it was sent within the appropriate period of time." *Ibid.* The Appeals Council "dismiss[ed] [petitioner's] request for review," stating that "[t]he [ALJ's] decision stands as the final decision of the Commissioner." *Ibid.* SSA's cover letter enclosing the Appeals Council's order stated that, "[u]nder our rules, the dismissal of a request for review is final and not subject to further review." *Id.* at 25.

3. a. Petitioner brought this action against the Acting Commissioner in the Eastern District of Kentucky seeking review of the Appeals Council's dismissal of his request for review. Pet. App. 4a, 23a. The Acting Commissioner moved to dismiss for lack of jurisdiction and failure to state a claim, or alternatively for summary judgment, arguing that the Appeals Council's order dismissing petitioner's request for review was not a "final decision" subject to judicial review under 42 U.S.C. 405(g). See D. Ct. Doc. 8, at 2 (Mar. 14, 2016). The Acting Commissioner contended that, under SSA's regulations, "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review," and

that "it is only after the Appeals Council has *denied* review, or has *granted* review and issued its own decision, that the Commissioner has rendered a 'final decision' on the claim for benefits, which then is subject to judicial review pursuant to 42 U.S.C. § 405(g)." *Ibid.* (citing 20 C.F.R. 416.1472).

The district court granted the Acting Commissioner's motion to dismiss. Pet. App. 22a-26a. The court reasoned that, under SSA's regulations, "[r]eview by a federal court is only available once a claimant has completed all of the steps of the administrative process." *Id.* at 24a. The court concluded that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review, absent the presence of a colorable constitutional claim." *Id.* at 25a. The court relied on SSA's regulation specifying that a decision of the Appeals Council dismissing a request for review as untimely is "binding and not subject to further review," *id.* at 24a (citing 20 C.F.R. 416.1472), and on Sixth Circuit precedent, see *id.* at 24a-25a.

The district court also determined that petitioner had not pleaded a "colorable constitutional claim," rejecting (as relevant) petitioner's contention that the Due Process Clause, U.S. Const. Amend. V, compelled a finding that the request for review had been timely. Pet. App. 25a. The court noted that petitioner had not "offer[ed] any proof that he mailed his written request on April 24, 2014, aside from his own testimony." *Ibid.* The court explained that, "[a]bsent independent evidence, such as a postmark or dated receipt," it "c[ould]not reverse the Appeals Council's determination" of untimeliness. *Ibid.*

Petitioner moved for relief from the judgment under Federal Rule of Civil Procedure 59(e). Pet. App. 16a. The district court denied the motion. *Id.* at 16a-21a.

b. The court of appeals affirmed. Pet. App. 1a-15a. The court observed that, under SSA's regulations, a dismissal by the Appeals Council "is binding and not subject to further review," and that "[j]udicial review is available only after administrative exhaustion." *Id.* at 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, 416.1472). The court noted that it "ha[d] not directly addressed * * * in a published opinion" whether such Appeals Council dismissals are reviewable under 42 U.S.C. 405(g), but that it had previously held judicial review was not available in a "similar" context where an ALJ dismissed as untimely a request for an ALJ hearing. See Pet. App. 6a (citing *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 68 (6th Cir. 1993)).

The court of appeals explained that *Hilmes* relied on *Califano* v. *Sanders*, 430 U.S. 99 (1977), which had "held that judicial review of a denial of a petition to reopen a prior final decision is unavailable in the absence of a colorable constitutional claim." Pet. App. 5a. As the court of appeals observed, *Sanders*

> reasoned that[] "an interpretation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [42 U.S.C. 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits."

Id. at 5a-6a (quoting *Sanders*, 430 U.S. at 108). *Hilmes* "followed the *Sanders* rationale and held that the dismissal of [an ALJ] hearing request as untimely was unreviewable." *Id.* at 6a (citing *Hilmes*, 983 F.2d at 69-70).

The court of appeals here observed that, "[i]n subsequent unpublished cases, [it] ha[d] applied the *Sanders* and *Hilmes* rules to hold that an order from the Appeals Council dismissing a plaintiff's appeal as untimely is not a 'final decision' as defined by the Social Security Act and regulations." *Ibid.* The court adopted that same conclusion in its published decision in this case. *Id.* at 8a ("[W]e conclude that Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court.").

The court of appeals noted that its position accorded with "the majority view * * * that the Appeals Council's decision to hear an untimely request for review is discretionary, and refusals of such requests do not constitute 'final decisions' reviewable by district courts," citing decisions of seven other courts of appeals. Pet. App. 7a-8a (citing *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 (10th Cir. 1998); *Bacon* v. *Sullivan*, 969 F.2d 1517, 1520 (3d Cir. 1992); *Matlock* v. *Sullivan*, 908 F.2d 492, 494 (9th Cir. 1990); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Adams* v. *Heckler*, 799 F.2d 131, 133 (4th Cir. 1986); *Smith* v. *Heckler*, 761 F.2d 516, 518 (8th Cir. 1985); and *Dietsch* v. *Schweiker*, 700 F.2d 865, 867 (2d Cir. 1983)). Only the Eleventh Circuit, the court of appeals continued, had reached a contrary conclusion, in its 1983 decision in *Bloodsworth* v. *Heckler*, 703 F.2d 1233.[3]

The court of appeals specifically endorsed the reasoning of the Eighth Circuit in *Smith*, which had stated that an Appeals Council dismissal of a request for review as untimely "does not address the merits of the

---

[3] As noted below, the Seventh Circuit had recently issued a decision reaching the same result as *Bloodsworth*. See *Casey* v. *Berryhill*, 853 F.3d 322, 326 & n.1 (2017); p. 28, *infra*.

claim, and thus cannot be considered appealable, as can the Appeals Council's decisions and denials of *timely* requests for review." Pet. App. 7a (quoting *Smith*, 761 F.2d at 518). The court of appeals here further echoed the Eighth Circuit's observation that, "[i]f the claimant may obtain review in this situation," then "the Secretary's orderly procedures for processing disability claims mean little or nothing," and "any claimant could belatedly appeal his claim at any time and always obtain district court review of an ALJ's decision." *Id.* at 7a-8a (quoting *Smith*, 761 F.2d at 518).

The court of appeals additionally determined that petitioner did not have a colorable due process claim that would be reviewable under 42 U.S.C. 405(g) notwithstanding what it held to be the general preclusion of judicial review of a dismissal of an untimely request for Appeals Council review. Pet. App. 8a-14a. The court observed that "[t]he use of constitutional language to dress up a claim 'does not convert the argument into a colorable constitutional challenge.'" *Id.* at 8a (citation omitted). As relevant here, the court rejected petitioner's contention that the Appeals Council violated his due process rights by refusing to consider what petitioner maintains was a timely-submitted request for review, citing the "lack of independent evidence" to corroborate petitioner's assertion that he in fact submitted his request on time. *Id.* at 10a.

DISCUSSION

Petitioner contends (Pet. 16-21) that the court of appeals erred in concluding that the decision of the Appeals Council dismissing his request for review on the ground that it is untimely is not a "final decision" subject to judicial review under 42 U.S.C. 405(g). Petitioner additionally contends (Pet. 8-13) that the courts of appeals are divided on that question. The decision below accords with

the position maintained for many years by SSA and, until recently, by all but one of the courts of appeals that have addressed the issue. In light of a recent decision of the Seventh Circuit giving currency to the issue and deepening the conflict among the courts of appeals, however, the government has reexamined the question and concluded that its prior position was incorrect. The government has further concluded that this Court's review is warranted to resolve the circuit conflict and that this case is a suitable vehicle for this Court's review of the question. If the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

1. The court of appeals held that "Appeals Council decisions to dismiss untimely petitions for review are not final decisions reviewable in federal court" under 42 U.S.C. 405(g). Pet. App. 8a. We have concluded that that position is incorrect.

a. The availability of judicial review of SSA's adjudication of an application for benefits under Title II or Title XVI of the Social Security Act is governed by 42 U.S.C. 405(g). Section 405(g) authorizes any party to an SSA proceeding on an application for Title II benefits to "obtain a review" in federal district court of "any final decision of the Commissioner of Social Security made after a hearing." *Ibid.* Section 405(h) makes Section 405(g)'s mechanism the exclusive avenue for judicial review of Title II benefits determinations. 42 U.S.C. 405(h) (providing that "[n]o findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided," and barring suits against the United States or its officers under 28 U.S.C. 1331 and 1346 (2012 & Supp. V 2017) "to recover on any claim arising under" Title II);

see *Mathews* v. *Eldridge*, 424 U.S. 319, 327 (1976). Title XVI, in turn, incorporates Section 405(g) for cases involving supplemental-security-income benefits, which petitioner sought here, providing that "[t]he final determination of the Commissioner * * * after a hearing" is "subject to judicial review as provided in section 405(g) * * * to the same extent as the Commissioner's final determinations under section 405." 42 U.S.C. 1383(c)(3).

By its terms, Section 405(g) permits judicial review if and only if the Commissioner has rendered "a 'final decision' * * * after a 'hearing.'" *Eldridge*, 424 U.S. at 328 (quoting 42 U.S.C. 405(g)). The Court has held that "this condition consists of two elements": a "jurisdictional," "nonwaivable * * * requirement that a claim for benefits shall have been presented to the [Commissioner]," and a nonjurisdictional, "waivable * * * requirement that the administrative remedies prescribed by the [Commissioner] be exhausted." *Ibid.*; accord *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 15 (2000) (Section 405(g) imposes a "nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court," and an additional requirement that a claimant exhaust "the procedural steps set forth in § 405(g)").[4]

b. The Appeals Council's order dismissing as untimely petitioner's request for review of the ALJ's decision made after a hearing satisfies both requirements. The "nonwaivable" requirement is satisfied because petitioner "presented" his "claim for benefits" to SSA by filing an

---

[4] In *Califano* v. *Sanders*, 430 U.S. 99 (1977), the Court explained that it had previously "authorized judicial review under [Section 405(g)]" in cases where enforcing the waivable exhaustion-of-remedies requirement otherwise "would effectively have closed the federal forum to the adjudication of colorable constitutional claims." *Id.* at 108-109 (citing *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Eldridge*, *supra*).

application, *Eldridge*, 424 U.S. at 328; see Pet. App. 3a, and the question whether petitioner timely filed his request for Appeals Council review was also presented to and decided by the agency, Pet. App. 3a-4a; see pp. 8-10, *supra*. As explained below, the waivable exhaustion-of-remedies requirement—that SSA must have rendered a "final decision" made "after a hearing," *Eldridge*, 424 U.S. at 328 (citation and internal quotation marks omitted)—is satisfied as well.

i. There is no dispute that the Appeals Council's decision of which petitioner seeks review was made "after a hearing." 42 U.S.C. 405(g). After receiving SSA's initial and reconsideration determinations, petitioner timely requested a hearing before an ALJ, and a hearing was conducted in February 2014. Pet. App. 3a, 16a. The ALJ subsequently issued a decision on the merits of petitioner's application for benefits. See *ibid.*; D. Ct. Doc. 8-1, at 4-15. Neither the Acting Commissioner nor the courts below therefore questioned that Section 405(g)'s "after a hearing" requirement was met here.[5]

---

[5] If the claimant does not seek review by an ALJ within 60 days of the denial of his request for reconsideration, an ALJ would typically "dismiss" the request for a hearing. 20 C.F.R. 416.1457(c)(3). Courts of appeals are divided on whether such dismissals satisfy the requirement that SSA's decision be made "after a hearing" in order to be subject to judicial review. Compare, *e.g.*, *Hilmes* v. *Secretary of Health & Human Servs.*, 983 F.2d 67, 69-70 (6th Cir. 1993) (holding review of dismissal of request for ALJ hearing is not available because no "hearing" has occurred (citation and emphasis omitted)), with *Boley* v. *Colvin*, 761 F.3d 803, 806 (7th Cir. 2014) (holding review is available because "a 'hearing' for the purpose of [Section 405(g)] is a decision after whatever procedures the agency elects to use" in reaching that decision). Because an ALJ hearing occurred here before the Appeals Council dismissed petitioner's request for review, this case does not present that distinct question.

ii. The court of appeals' conclusion that Section 405(g) foreclosed judicial review here rested instead on its determination that the Appeals Council's order dismissing as untimely a request for review of an ALJ decision after a hearing is not a "final decision[]." Pet. App. 8a; see *id.* at 6a-8a. That determination is incorrect when considered in light of ordinary usage and the broader context of finality of administrative decisions.

The Social Security Act "does not define 'final decision.'" *Sims* v. *Apfel*, 530 U.S. 103, 106 (2000). "When a term goes undefined in a statute," the Court typically will "give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Where an undefined statutory phrase is a "term of art" or otherwise has a well-established meaning in a given statutory context, the Court will consult that meaning. *Magwood* v. *Patterson*, 561 U.S. 320, 332 (2010) (citation omitted); see also, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 612-613 (1992). Here, both the ordinary meaning of "final" and its familiar meaning in the context of administrative adjudications point to the same conclusion.

In ordinary usage, a decision is "final" if it "[p]ertain[s] to, or occur[s] at, the end or conclusion" of a process, or if it is "[c]onclusive," "[d]ecisive," or "[d]efinitive." *Webster's New International Dictionary of the English Language* 948 (2d ed. 1949). An Appeals Council order dismissing as untimely a request for review of an ALJ decision is final under each of those definitions. SSA's regulations state that such a dismissal "is binding and not subject to further review." 20 C.F.R. 416.1472. The dismissal thus marks the end of SSA's considera-

tion of a benefits application and is conclusive of whether SSA will review the ALJ's decision and consider the claim on the merits.

In the administrative-law context, this Court's precedent ascribes a similar meaning to "final" agency action. For purposes of the availability of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 704, the Court has explained that, "[a]s a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997) (citation omitted). "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-178 (quoting *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

An Appeals Council dismissal order bears both of those "hallmarks of APA finality." *Sackett* v. *EPA*, 566 U.S. 120, 126 (2012). Such an order does not represent a "merely tentative or interlocutory" determination, but instead marks the end of the agency's consideration. *Bennett*, 520 U.S. at 178. SSA's regulations provide that the agency will not "review" the dismissal order further. 20 C.F.R. 416.1472. The dismissal order also has "legal consequences" and determines the claimant's "rights [and] obligations," *Bennett*, 520 U.S. at 178 (citation omitted), because it cements the ALJ's decision regarding the applicant's entitlement to receive the requested benefits, 20 C.F.R. 416.1455 (ALJ's decision

is "binding" if not reviewed); see *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) (an "Appeals Council decision not to review *finalizes* the decision made after a hearing by the administrative law judge"). Although the APA was enacted in 1946, see ch. 324, 60 Stat. 237—after 42 U.S.C. 405(g) (Supp. V 1939), which was enacted in 1939, see Social Security Act Amendments of 1939, ch. 666, Tit. II, § 201, sec. 205(g), 53 Stat. 1370-1371—the APA codified preexisting principles of judicial review of agency action, see, *e.g.*, *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987), and is instructive on the meaning of "final decision" under 42 U.S.C. 405(g).

c. The court of appeals' reasons for holding that an Appeals Council order dismissing as untimely a request for review of an ALJ decision after a hearing is not a "final decision" are, in the end, insufficient to overcome the foregoing considerations in interpreting Section 405(g).

i. The court of appeals reasoned that such a dismissal is not final because it "does not address the merits of the claim" for benefits. Pet. App. 7a (citation omitted). But Section 405(g) does not by its terms limit judicial review to cases in which the most recent agency ruling addresses the underlying merits. See *Casey* v. *Berryhill*, 853 F.3d 322, 326 n.1 (7th Cir. 2017) ("[Section] 405(g) allows judicial review when a claim has been presented and finally decided, even when that final decision is (or purports to be) a dismissal for untimeliness" (citation and internal quotation marks omitted)). Because the Appeals Council's dismissal "*finalizes* the decision made after a hearing by the [ALJ]," *Bloodsworth*, 703 F.2d at 1239, it makes no difference whether the Appeals Council itself considers the underlying merits in declining to

grant review or dismisses the request on other grounds. That conclusion accords with lower courts' decisions treating agency dismissals on timeliness or other procedural or jurisdictional grounds as final in other contexts.[6] And it aligns with courts of appeals' routine practice of reviewing under 28 U.S.C. 1291 district-court decisions dismissing cases on jurisdictional or procedural grounds.[7]

ii. The court of appeals also relied on SSA's regulations providing that judicial review of an Appeals Council dismissal on timeliness grounds is not available. Pet. App. 5a (citing 20 C.F.R. 416.1400(a)(5), 416.1471, and 416.1472); see *id.* at 6a-8a. And this Court has recognized that, because the Social Security Act does not define "'final decision,'" and because Section 405(a) of the Act grants the Commissioner authority to adopt regulations and procedures implementing the administrative-review scheme, the term's meaning is largely "left to the [Commissioner] to flesh out by regulation." *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975); see *Sims*, 530 U.S. at 106. But SSA's regulations cannot insulate Appeals Council dismissals from the judicial review that Congress expressly made available by

---

[6] See, *e.g.*, *Auburn Reg'l Med. Ctr.* v. *Sebelius*, 642 F.3d 1145, 1148 (D.C. Cir. 2011) (agency dismissal on timeliness grounds "is final in any sense of the word"), rev'd on other grounds, 568 U.S. 145 (2013); *Khan* v. *U.S. Dep't of Justice*, 494 F.3d 255, 259-260 (2d Cir. 2007) (reviewing agency decision that administrative appeal was untimely); *Cox* v. *Benefits Review Bd.*, 791 F.2d 445, 446-447 (6th Cir. 1986) (per curiam) (reviewing agency decision that administrative petition for review was insufficient to exhaust administrative remedies).

[7] See, *e.g.*, *Farzana K.* v. *Indiana Dep't of Educ.*, 473 F.3d 703, 708 (7th Cir. 2007); *Loya* v. *Desert Sands Unified Sch. Dist.*, 721 F.2d 279, 281 (9th Cir. 1983); *Athens Cmty. Hosp., Inc.* v. *Schweiker*, 686 F.2d 989, 993 (D.C. Cir. 1982), modified on reh'g, 743 F.2d 1 (D.C. Cir. 1984).

statute. Section 405(g) unambiguously provides for judicial review of "final decision[s]" by SSA "made after a hearing." 42 U.S.C. 405(g). Because an Appeals Council order dismissing as untimely an appeal of an ALJ decision after a hearing is a final decision made after hearing, see pp. 17-21, *supra*, it is judicially reviewable under Section 405(g), and the agency cannot alter that result by regulation.

To be sure, Section 405 grants the Commissioner discretion to "specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." *Salfi*, 422 U.S. at 766. SSA thus may establish the steps of the administrative-review process and may determine, within the limits set by the statute, when that process ends and judicial review may be sought. As a result, SSA generally may choose whether to continue considering a particular claim for benefits, or instead to terminate its consideration, make its ruling binding, and allow judicial review.

It does not follow from that discretion to adopt procedural exhaustion requirements, however, that SSA may provide for the Appeals Council to decline to review an ALJ's adjudication of the merits—rendering the ALJ's decision binding—based on the agency's determination that the claimant failed to comply with the agency's procedural requirements, while simultaneously foreclosing any judicial review of that determination that the procedural requirements were not satisfied. *Bloodsworth*, 703 F.2d at 1239. The court of appeals concluded that petitioner was barred from seeking judicial review because the Appeals Council determined that petitioner had not timely submitted a request for review to the Appeals Council and had not shown good cause for missing the deadline. Pet. App. 5a-8a. But it is the Appeals

Council's determination that petitioner did not timely submit his request for review to the Appeals Council that petitioner seeks to challenge in this action.

iii. The court of appeals also relied on the "rationale" (Pet. App. 6a) of this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977), but the Court's reasoning in *Sanders* does not support the court of appeals' conclusion here. In *Sanders*, this Court held that SSA's denial of a petition to reopen a prior final decision was not a "final decision" subject to judicial review under Section 405(g). 430 U.S. at 108. The Court explained that "the opportunity to reopen final decisions * * * [is] afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* It further reasoned that "allow[ing] a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [Section 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Ibid.* "In other words, one opportunity for judicial review is enough," and "a claimant who bypasses that chance cannot create another by a procedure that would evade a statutory deadline." *Boley* v. *Colvin*, 761 F.3d 803, 807 (7th Cir. 2014).

As the Eleventh Circuit has explained, however, "review and reopening play fundamentally different roles in the process of administrative decision making and have significantly different effects upon the finality of administrative decisions." *Bloodsworth*, 703 F.2d at 1237. Reopening "is an extraordinary measure, affording the opportunity of a second excursion through the decision making process." *Id.* at 1238. In contrast, review by the Appeals Council is "a normal stage in the administrative review procedure, available as of right to any party." *Id.*

at 1237. It is not "a bonus opportunity" for review after the ordinary process of direct administrative review has been completed, but part of that process of direct review itself. *Id.* at 1238.

In addition, review of the Appeals Council's dismissal order does not enable a claimant who failed to comply with SSA's deadlines for administrative review to evade the consequences of that failure by securing judicial review on the merits. A court reviewing an agency decision is limited to reviewing the grounds the agency gave for its decision. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). If the Appeals Council dismissed a request for review based on its finding that the request was untimely and that good cause to excuse the untimeliness did not exist, a court could not review the merits of the underlying decision denying benefits. Instead, it could review only the Appeals Council's dismissal of the applicant's request for review as untimely. In doing so, moreover, the court would not review the agency's basis for the Appeals Council's dismissal de novo. The court ordinarily could review the agency's factual findings (including that the request for review was untimely) only to "determine whether [they are] supported by 'substantial evidence,'" *Dickinson* v. *Zurko*, 527 U.S. 150, 164 (1999) (citation omitted); see *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971), and the agency's determination not to exercise its discretion to excuse an untimely request for review at most only for an abuse of that discretion. If the court found no reversible error in the agency's decision to dismiss the request for review as untimely, the court could not disturb the agency's ruling on the merits. See *Woodford* v. *Ngo*, 548 U.S. 81, 90-91 (2006). And if the court concluded that the Appeals Council committed reversible

error, the court could only remand to the agency to address the merits. See, *e.g.*, *Casey*, 853 F.3d at 329 (explaining that, because there was "no 'final decision' on the underlying merits," the merits were "a question for the agency to consider on remand").

d. In concluding that the Appeals Council's dismissal of petitioner's appeal as untimely is not judicially reviewable under 42 U.S.C. 405(g), the court of appeals embraced the government's longstanding position, which has been reflected in SSA regulations in force since 1980, see p. 7, *supra*, and which until 2017 had been endorsed by all but one court of appeals to address the issue, see pp. 26-27, *infra*.[8] The government advocated that position in this case. In the district court and the court of appeals, the Acting Commissioner contended that Congress gave the Commissioner discretion to decide what constitutes a "final decision" subject to judicial review under 42 U.S.C. 405(g). Gov't C.A. Br. 8-12; D. Ct. Doc. 8, at 1-2. The government further contended that, in the exercise of that discretion, SSA has validly promulgated regulations providing that an Appeals Council dismissal of a request for review as untimely is not a reviewable final decision. The government has taken that position in many other cases as well.[9]

---

[8] Before SSA codified its position in its regulation in 1980s, SSA maintained that the Appeals Council's dismissal of a request for review of an ALJ decision as untimely was not judicially reviewable. See, *e.g.*, *Sheehan* v. *Secretary of Health, Educ. & Welfare*, 593 F.2d 323, 325-326 (8th Cir. 1979) (holding Appeals Council dismissal was not reviewable).

[9] See, *e.g.*, Br. in Opp. at 10 n.4, *Lary* v. *Chater*, 522 U.S. 812 (1997) (No. 96-1849) (arguing in context of Medicare case also governed by Section 405(g) that Appeals Council dismissal was not reviewable).

In light of the petition for a writ of certiorari in this case and the Seventh Circuit's recent contrary decision in *Casey*, *supra*; see p. 28, *infra*, however, the government has now reconsidered its position. The government concludes that the position petitioner advocates here is correct and that, for the reasons stated above, a decision of the Appeals Council dismissing as untimely a request for review of an ALJ decision after a hearing is a "final decision" within the meaning of 42 U.S.C. 405(g).

2. a. As petitioner observes (Pet. 8-12), and as the court of appeals acknowledged (Pet. App. 7a), the courts of appeals are divided on whether Appeals Council dismissal orders on untimeliness grounds are final decisions reviewable under Section 405(g).[10]

The decision below accords with published decisions of the Third, Fifth, Eighth, Ninth, and Tenth Circuits holding that such orders are not reviewable under Section 405(g). See *Bacon* v. *Sullivan*, 969 F.2d 1517, 1519-1522 (3d Cir. 1992); *Harper ex rel. Harper* v. *Bowen*, 813 F.2d 737, 739-743 (5th Cir.), cert. denied, 484 U.S. 969 (1987); *Smith* v. *Heckler*, 761 F.2d 516, 518-519 (8th Cir. 1985); *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (9th Cir. 1990); *Brandtner* v. *Department of Health & Human Servs.*, 150 F.3d 1306, 1307 & n.2 (10th Cir. 1998). The First Circuit has reached the same conclusion in an unpublished opinion. See *Rothman* v. *Secretary of Health & Human Servs.*, 70 F.3d 110, 1994 WL

---

[10] As noted above, see p. 17 n.5, *supra*, courts of appeals also have disagreed over whether a dismissal of a request for a hearing before an ALJ is reviewable under Section 405(g). Courts of appeals addressing the reviewability of Appeals Council dismissals have sometimes relied in part on decisions addressing dismissals of requests for ALJ hearings. See Pet. App. 6a (citing *Hilmes*, *supra*); *Casey*, 853 F.3d at 326 & n.1 (citing *Boley*, *supra*).

866086, at *1 (Dec. 8, 1994) (Tbl.) (Appeals Council dismissal of request for review as untimely "is not a 'final decision' for the purposes of 42 U.S.C. § 405(g) and thus is not reviewable in federal court."). The Second Circuit has held that review under Section 405(g) is unavailable and that review can be obtained only through a writ of mandamus. See *Dietsch* v. *Schweiker*, 700 F.2d 865, 867-868 (1983).

In contrast, two other circuits have concluded that Appeals Council dismissal orders are reviewable under Section 405(g). In *Bloodsworth*, the Eleventh Circuit held that a decision of the Appeals Council dismissing a request for review as untimely was a reviewable "final decision" under Section 405(g). See 703 F.2d at 1236-1239. The court explained that an Appeals Council decision, "whether it is a determination on the merits or a denial of [a] request to review, is binding and final and appeal therefrom is available to any party as a matter of statutory right under section 405(g)." *Id.* at 1237.[11] The Eleventh Circuit does not appear to have departed from *Bloodsworth*. See *Stone* v. *Heckler*, 778 F.2d 645, 648 (1985) (distinguishing *Bloodsworth* but stating that "it remains binding precedent in this circuit").

---

[11] *Bloodsworth* inaccurately stated that SSA's regulations drew no "distinction in regard to rights of judicial appeal between dismissals and determinations on the merits by the Appeals Council." 703 F.2d at 1237. SSA regulations, then as today, stated that further review of an Appeals Council dismissal order was precluded but that judicial review of an Appeals Council determination on the merits was available. 20 C.F.R. 416.1472, 416.1481 (1982). The Eleventh Circuit made clear, however, that its decision also rested on its interpretation of "the statute" and its conclusion that an Appeals Council dismissal is final within the meaning of Section 405(g). *Bloodsworth*, 703 F.2d at 1237.

The Seventh Circuit recently joined the Eleventh Circuit in holding that courts can review SSA decisions dismissing requests for Appeals Council review as untimely. In *Casey*, the Appeals Council had dismissed a claimant's request for review on the ground that it was not timely filed. 853 F.3d at 323. Recognizing that SSA regulations rendered that decision "supposedly not reviewable," the Seventh Circuit nonetheless reviewed the timeliness determination, explaining that Section 405(g) "'allows judicial review when a claim has been presented and finally decided,' even when that final decision is * * * a dismissal for untimeliness." *Id.* at 326 n.1 (citation omitted).[12]

b. But for the Seventh Circuit's decision in *Casey*, this Court's review might not have been warranted. The disagreement between the Eleventh Circuit's decision in *Bloodsworth* and the decisions of every other court of appeals to address the question until 2017 had existed for several decades, and a possibility existed that the Eleventh Circuit might reconsider the issue and resolve the conflict. In light of the Seventh Circuit's recent decision in *Casey*, however, the issue has taken on new currency, and the division among the circuits is

---

[12] The Fourth Circuit's position is less clear. In *Adams* v. *Heckler*, 799 F.2d 131 (1986), the Fourth Circuit held that Section 405(g) does not permit a court to review "the merits" of SSA's benefits decision in an action challenging an Appeals Council dismissal, but it "[a]ssume[d] without deciding that [it] ha[d] jurisdiction to review the Appeals Council's decision to dismiss and refusal to find good cause" and "f[ound] no grounds to reverse" in that case. *Id.* at 133-134. In a later, unpublished decision, however, the Fourth Circuit broadly stated that "[r]efusal to review for failure to file a timely request is not a 'final decision by the Secretary' reviewable under" Section 405(g). *Dillow* v. *Sullivan*, 952 F.2d 1396, 1992 WL 6810, at *1 (1992) (per curiam) (Tbl.).

entrenched and is not likely to resolve itself without this Court's intervention.

The resulting disuniformity warrants resolution by this Court. Social Security claimants in the Seventh and Eleventh Circuits can obtain judicial review of Appeals Council determinations of untimeliness, while claimants elsewhere in the country cannot. See pp. 26-28, *supra*; see also SSAR 99-4(11), 64 Fed. Reg. at 57,689 (acquiescence ruling stating that, because of *Bloodsworth*, "[n]otices sent by the Appeals Council which dismiss requests for review of ALJ decisions will advise claimants in" the Eleventh Circuit "of their right to request judicial review").[13]

The issue is also recurring. Published statistics are not currently available, but this Office has been informed by SSA that the Appeals Council dismissed approximately 4000 cases in Fiscal Year 2017, including approximately 2500 on untimeliness grounds. Barring another impediment to review or a colorable constitutional claim, the question presented in this case would govern the availability of judicial review under Section 405(g) in each of those cases where an applicant contends that the dismissal was erroneous.[14]

---

[13] SSA has not yet issued an acquiescence ruling applicable to the Seventh Circuit in light of *Casey*.

[14] Review of certain agency decisions under the Medicare Program is also governed by Section 405(g), see, *e.g.*, 42 U.S.C. 1395ff(b)(1)(A), and the Center for Medicare & Medicaid Services in the Department of Health and Human Services has adopted a regulation similarly providing that "[t]he dismissal of a request for [Medicare Appeals] Council review or denial of a request for review of a dismissal issued by an ALJ or attorney adjudicator is binding and not subject to further review unless reopened and vacated by the Council." 42 C.F.R. 405.1116.

3. This case provides an adequate vehicle to address the question presented. The court of appeals squarely addressed the issue, expressly holding that "an Appeals Council decision to refrain from considering an untimely petition for review is not a 'final decision' subject to judicial review in federal court." Pet. App. 2a-3a. Reversal of that determination would be dispositive and would mean that petitioner is entitled to judicial review.

The fact that the district court and court of appeals—in the course of determining whether petitioner had presented a "colorable constitutional claim"—each considered and rejected petitioner's contention that the Appeals Council violated his due process rights by rejecting his allegedly timely request for review, Pet. App. 8a-13a, 25a, does not render this case an unsuitable vehicle. Both courts addressed the timeliness of petitioner's request for review only through the lens of due process, see *ibid.*, and that constitutional framing may have affected the courts' analysis. Moreover, neither court's consideration of petitioner's due process argument entailed consideration of whether review could extend to the Appeals Council's further determination that petitioner had not demonstrated good cause for missing the deadline for requesting review.

Indeed, the fact that the lower courts' reading of Section 405(g) led petitioner and the courts to reconceptualize his allegation of garden-variety administrative error in constitutional terms is one of the adverse consequences of their approach. Other courts have followed the same approach, entertaining challenges to Appeals Council dismissals if cast as constitutional violations. See, *e.g.*, *Dexter* v. *Colvin*, 731 F.3d 977, 980-981 (9th Cir. 2013); *Callender* v. *SSA*, 275 Fed. Appx. 174, 176

(3d Cir. 2008) (per curiam). The Seventh Circuit recently observed that construing Section 405(g) in a way that "forces courts to resolve constitutional questions unnecessarily, while bypassing statutes, regulations, and principles of administrative law that might suffice to decide the case, has nothing to recommend it." *Boley*, 761 F.3d at 808. "Making jurisdiction turn on the presence of a constitutional argument * * * would lead claimants to present" and courts to adjudicate "unnecessary constitutional arguments," *id.* at 807, contrary to the "fundamental and longstanding principle of judicial restraint," which "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them," *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

* * * * *

As stated above, although the court of appeals in this case adopted the position the government has long maintained, this case and the now-further-entrenched circuit conflict prompted the government to reconsider that position. For the reasons stated above, the government agrees with petitioner that a decision of SSA's Appeals Council dismissing as untimely a request for review of an ALJ decision after a hearing is a "final decision" subject to judicial review under 42 U.S.C. 405(g). For that reason, if the Court grants plenary review, the Court may wish to consider appointing an amicus curiae to defend the judgment of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
CHARLES W. SCARBOROUGH
SARAH CARROLL
Attorneys

SEPTEMBER 2018

No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL, Deputy Commissioner for Operations, Social Security Administration,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Avenue
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii
Reply Brief for Petitioner 1
A. Petitioner obtained a final decision within the meaning of Section 405(g) 2
1. Exhaustion of administrative remedies is not a jurisdictional requirement under Section 405(g) 2
2. Judicial review is available under Section 405(g) regardless of whether the Appeals Council addresses the merits 8
B. Section 405(g)'s "after a hearing" requirement is satisfied in this case 12
C. *Chevron* deference does not apply in these circumstances 15
D. The district court may address the merits of petitioner's claim if it overrules or excuses petitioner's failure to exhaust 17
E. A holding in favor of petitioner would have a very modest impact on the federal courts' caseload 20
Conclusion 22

TABLE OF AUTHORITIES

Cases

Bell v. *Hood*,
327 U.S. 678 (1946) 5

Bloodsworth v. *Heckler*,
703 F.2d 1233 (11th Cir. 1983) 13

Boley v. *Colvin*,
761 F.3d 803 (7th Cir. 2014) 14-15

Booth v. *Churner*,
532 U.S. 731 (2001) 4

Bowen v. *City of New York*,
476 U.S. 467 (1986) ..... *passim*

Bowen v. *Massachusetts*,
487 U.S. 879 (1988) 4-5

Bowen v. *Michigan Acad. of Family Physicians*,
476 U.S. 667 (1986) 16

Brown v. *Colvin*,
825 F.3d 936 (8th Cir. 2016) 10

Califano v. *Sanders*,
430 U.S. 99 (1977) ..... *passim*

Cohen v. *Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) 18

Consolidated Rail Corp. v. *Darrone*,
465 U.S. 624 (1984) 6

Damato v. *Sullivan*,
945 F.2d 982 (7th Cir. 1991) 10

Descamps v. *United States*,
570 U.S. 254 (2013) 19

Energy Transfer Partners v. *FERC*,
567 F.3d 134 (5th Cir. 2009) 17

Cases—continued

Heckler v. *Day*,
467 U.S. 104 (1984) 6

Heckler v. *Ringer*,
466 U.S. 602 (1984) 4

James v. *Commissioner of Internal Revenue*,
850 F.3d 160 (4th Cir. 2017) 5

INS v. *St. Cyr*,
533 U.S. 289 (2001) 16

Jones v. *Bock*,
549 U.S. 199 (2007) 4-5, 19

K Mart Corp. v. *Cartier, Inc.*,
486 U.S. 281 (1988) 7

LeFande v. *District of Columbia*,
841 F.3d 485 (D.C. Cir. 2016) 17

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 1, 3-4, 16

Matlock v. *Sullivan*,
908 F.2d 492 (9th Cir. 1990) 14

McCarthy v. *Madigan*,
503 U.S. 140 (1992) 4, 18

Ramah Navajo Chapter v. *Lujan*,
112 F.3d 1455 (10th Cir. 1997) 16

SEC v. *Chenery Corp.*,
318 U.S. 80 (1943) 17

Sims v. *Apfel*,
530 U.S. 103 (2000) ..... *passim*

Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) 5

Stovic v. *Railroad Ret. Bd.*,
826 F.3d 500 (D.C. Cir. 2016) 13

Cases—continued

Sullivan v. *Hudson*,
490 U.S. 877 (1989) 7, 18

Taylor v. *Commissioner of Soc. Sec. Admin.*,
659 F.3d 1228 (9th Cir. 2011) 10

Teague v. *Lane*,
489 U.S. 288 (1989) 9

United States v. *Carver*,
260 U.S. 482 (1923) 9

Weinberger v. *Salfi*,
422 U.S. 749 (1975) 14-16

Your Home Visiting Nurse Servs. v. *Shalala*,
525 U.S. 449 (1999) 11-12

Zipes v. *Trans World Airlines, Inc.*,
455 U.S. 385 (1982) 4

Statutes and regulations

20 C.F.R.
404.968(b) 10
416.1400(a)(5) 10
416.1436(b) 12
416.1455 8
416.1467 9
416.1470(a)(4) 9

5 U.S.C. 704 4-5

42 U.S.C.
405(i) 7-8
405(a) 2
405(b)(1) 2, 7, 12-13
405(g) ..... *passim*

REPLY BRIEF FOR PETITIONER

The Sixth Circuit held in this case that federal courts "lack[] jurisdiction to review the Appeals Council's dismissal of [an] untimely request for review." Pet. App. 15a. As we showed in our principal brief (at 13-16), that holding cannot be squared with Section 405(g)'s plain text, which confers jurisdiction over "*any* final decision of the Commissioner of Social Security." 42 U.S.C. § 405(g) (emphasis added). A dismissal by the Appeals Council, even on untimeliness grounds, concludes the administrative review process and thus fits that description.

The Sixth Circuit's holding is contrary not only to the statute's text, but also to several of this Court's cases, which have held that the only jurisdictional prerequisite for judicial review under Section 405(g) is "the requirement that a claim for benefits shall have been presented to the Secretary," followed by "some decision by the Secretary." *Bowen* v. *City of New York*, 476 U.S. 467, 483 (1986) (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976)). The agency's determination that a claimant has not properly exhausted administrative remedies, by contrast, is a waivable and excusable affirmative defense. *Ibid.* That conclusion aligns with the standard rule in other administrative-law contexts.

So obvious is the inconsistency of the holding below with the statute's language, this Court's cases, and general principles of administrative law that the Solicitor General has confessed error and will no longer defend the lower court's judgment. The government thus agrees (U.S. Br. 22, 26-28) that Section 405(g)'s unambiguous text authorizes judicial review of the Appeals Council's untimeliness dismissal in this case. And it concedes (U.S. Br. 41) that the SSA's contrary

regulations exceed the authority conferred by Section 405(a) and therefore are not entitled to deference.

The contrary arguments advanced by the court-appointed amicus are not persuasive. Unable to blunt the plain meaning of the words "any final decision," he shifts principal focus (Br. 27-36) to a different statutory phrase, "after a hearing." But his position on that score is equally out of step with the statutory text and this Court's cases—including *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977), which held that that Section 405(g) authorizes judicial review after the kind of "hearing" before an ALJ required by Section 405(b)(1). Petitioner had such a hearing.

Chevron deference does not call for a different result. As an initial matter, the government has now disclaimed the legality of the agency's regulations. It would buck common sense to defer to those regulations nevertheless. Aside from that, the canon favoring judicial review forecloses the agency from interpreting Section 405(g) so narrowly.

For these reasons, and all those given in our principal brief and in the pages that follow, the judgment of the court of appeals should be reversed.

A. Petitioner obtained a final decision within the meaning of Section 405(g)

1. Exhaustion of administrative remedies is not a jurisdictional requirement under Section 405(g)

a. We demonstrated in our principal brief (at 14-16) that the words "any final decision" encompass an Appeals Council decision denying review on untimeliness grounds. That follows from the ordinary meaning of the word "final" and the broadening effect of the word "any." It follows also from general principles of administrative law, which provide for judicial review of

any agency decision that conclusively determines a person's legal rights or obligations. It means, at bare minimum, that a federal district court has jurisdiction to review whether the Appeals Council's untimeliness dismissal was an abuse of discretion.

Amicus responds (Br. 22-23) not with an analysis of the statute's text, but by pointing to dicta from this Court's cases. He thus cites the Court's statement in *City of New York*, 476 U.S. at 482, that "[o]nly a claimant who proceeds through all three stages [of administrative review] receives a final decision"; and in *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000), that "[i]f a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review in most cases." Amicus acknowledges (Br. 23) that these statements are non-binding dicta but describes them as evidence "that it is natural to read 'final decision' in this statute as referring to decisions on the merits after an exhaustion of remedies."

Although these statements favor amicus's position, dicta cannot override holdings. And both *City of New York* and *Eldridge* held explicitly that a "final decision" under Section 405(g) "consists of two elements, only one of which is purely 'jurisdictional.'" *City of New York*, 476 U.S. at 483 (quoting *Eldridge*, 424 U.S. at 328). The nonwaivable, jurisdictional element "is the requirement that a claim for benefits shall have been presented to the Secretary," followed by "some decision by the Secretary." *Eldridge*, 424 U.S. at 328. That requirement is satisfied in this case. The "waivable" element—the element that does *not* bear on the federal court's jurisdiction under Section 405(g)—is "the requirement that the administrative remedies prescribed by the Secretary be exhausted." *City of New York*, 476 U.S. at 483 (quoting *Eldridge*, 424 U.S. at 328).

In light of this clear precedent, the dicta from *Sims* and *City of New York* cannot support the notion that the words "final decision" in Section 405(g) incorporate administrative exhaustion as an element of jurisdiction. The same goes for the dictum from *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984).[1]

That follows not only from *City of New York* and *Eldridge*, but also from ordinary administrative-law standards. According to "the usual practice under the Federal Rules," "exhaustion is an affirmative defense" that must be raised by the defendant, not an element of jurisdiction that must be pleaded by the plaintiff. *Jones* v. *Bock*, 549 U.S. 199, 212 (2007) (collecting cases). See also, *e.g.*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (timely exhaustion of EEOC remedies "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Thus, a claimant's failure to exhaust ordinarily may be waived in the government's discretion or excused in the court's discretion. *City of New York*, 476 U.S. at 483-485; *McCarthy* v. *Madigan*, 503 U.S. 140, 146-149 (1992), superseded by statute as recognized in *Booth* v. *Churner*, 532 U.S. 731, 740 (2001). Cf. 5 U.S.C. § 704 (failure to exhaust is not a bar to judicial review under the APA).

Bowen v. *Massachusetts*, 487 U.S. 879 (1988), cited at page 17 of amicus's brief, is not to the contrary. The

---

[1] Amicus repeatedly wraps his contrary arguments in the words of Solicitor General Bork. *E.g.*, Br. 2, 22, 32, 43. That is a puzzling strategy; Solicitor General Bork made the same basic arguments in *Eldridge*, and this Court squarely rejected them. Compare U.S. Supp. Br. 7, *Mathews* v. *Eldridge*, No. 74-204 (contending that "exhaustion of administrative remedies" is a "jurisdictional requirement" under Section 405(g)), with *Eldridge*, 424 U.S. at 328 (rejecting the argument).

Court's holding there was simply that, when Congress has already provided an independent scheme of judicial review, Section 704 does not provide "additional judicial remedies." 487 U.S. at 903. Our point is not that if Section 405(g) falls short, Section 704 should make up the difference. It is instead that Section 704 embodies general, long-standing principles of administrative law with which Section 405(g) can and should be interpreted consistently. As this Court has said, "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Jones*, 549 U.S. at 212.

b. Amicus says (Br. 19 n.5) that it makes no difference whether exhaustion is jurisdictional or an affirmative defense; "[t]he bottom line," he insists, "is that, under a correct interpretation of the statute, Mr. Smith is not entitled to judicial review."

That is fundamentally wrong. It should go without saying that "an affirmative defense[] goes to the merits of a dispute." *Iames* v. *Commissioner of Internal Revenue*, 850 F.3d 160, 164 n.2 (4th Cir. 2017). And the question whether the claimant is entitled to relief on the merits is, perforce, one that "the district court can decide only after it has assumed jurisdiction over the controversy." *Bell* v. *Hood*, 327 U.S. 678, 683-684 (1946). Accord *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). That means that federal courts necessarily must have jurisdiction under Section 405(g) even when the agency concludes that the claimant failed to exhaust his administrative remedies.

That does not mean that the nature of the Appeals Council's decision—here, a dismissal on untimeliness grounds—plays no role in the court's subsequent consideration of the case. Assuming the government does not waive exhaustion, the threshold issue for the district court will be whether to overrule the Council's

dismissal of petitioner's request for review as untimely, or (if it does not) whether to disregard or set aside the failure to exhaust—as we explain in further detail at pages 17-19, *infra*.

c. Amicus contends (Br. 16) that "Section 405(g) cannot be properly interpreted without due regard for [its] context." In his view (Br. 16-18), the "massive" system necessary for "adjudicating millions of small social security claims" indicates that Congress intended Section 405(g) to be narrower than the "much broader" review provisions of the APA. Thus, by his lights (Br. 18), "[t]he structure of the Social Security Act reflects" a need for limited judicial review to avoid "a potentially intolerable burden on the federal courts."

We agree that Section 405(g) must be read in light of the statutory structure and the Social Security Act's broader context—but amicus turns those factors on their heads.

Consider first the Act's historical context and purpose. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 633 n.13 (1984) (statutory text "cannot be read in isolation from its history and purposes"). Contrary to amicus's ungenerous telling, "Congress designed [the Social Security Act] to be 'unusually protective' of claimants." *City of New York*, 476 U.S. at 480 (quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)). Thus, the administrative review process is "inquisitorial rather than adversarial," and "[i]t is the ALJ's duty to investigate the facts and develop the arguments" on behalf of claimants. *Sims*, 530 U.S. at 111. This is the description of an adjudicatory scheme that, although large, is unusually accommodating of claimants.

These "powerful protections for claimants" (Amicus Br. 18) do not expire at the courthouse door. For example, Congress conferred broad "remand powers" on

the federal courts, placing them "not in their accustomed role as external overseers of the administrative process, * * * but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council." *Sullivan* v. *Hudson*, 490 U.S. 877, 885 (1989). Thus, if Section 405(g) is "somewhat unusual" and "alien to traditional review of agency action under the Administrative Procedure Act," it is because it is *more* solicitous of judicial involvement, not less so. *Ibid.* Amicus is thus simply wrong that context indicates that Section 405(g) should be read narrowly.

Take next Section 405's specific design and structure. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) (courts must consider "the particular statutory language at issue, as well as the language and design of the statute as a whole"). According to amicus's interpretation of the statute (Br. 2, 22), claimants who are found not to have sought timely Appeals Council review will never receive a "final decision" within the meaning of Section 405(g). See also U.S. Br. 19, 34.

That would conflict with the broader statutory scheme in two ways. First, as the Solicitor General notes (U.S. Br. 34-35), amicus's position would collide with Section 405(b)(1), which "direct[s]" the Commissioner, without exception, to issue "decisions as to the rights of any individual applying for a payment."

Second, it would conflict with Section 405(i), which instructs the Commissioner, upon reaching a "final decision" that grants benefits, to make the necessary certifications for the issuance of payment. 42 U.S.C. § 405(i). When claimants receive partially favorable decisions, however, they are entitled to *both* payment *and*

appeal.[2] Yet, on amicus's reading of the statute, claimants who accept a partial win and decline to seek further administrative review would never receive a "final decision" within the meaning of the statute, and thus would never be entitled to the certifications necessary for payment under Section 405(i), even with respect to the favorable portions of their claims.

2. *Judicial review is available under Section 405(g) regardless of whether the Appeals Council addresses the merits*

a. We explained in our principal brief (at 16) that it is immaterial for purposes of Section 405(g) whether the Appeals Council's order terminating a request for benefits is based upon procedure or substance. Either way, the result is to leave standing (and render binding) the ALJ's rejection of the underlying claim for benefits. See 20 C.F.R. § 416.1455.

That is the case here: The Appeals Council's order conclusively terminated petitioner's application for benefits, effectively disposing of all issues involved in the case. It was therefore a "final decision" within the meaning of Section 405(g). The Solicitor General agrees. See U.S. Br. 26-30.

Amicus rejoins (Br. 23) that the "structure" of the Social Security Act indicates that "final decision" refers to "decisions on the merits." He notes (*ibid.*) that "the Social Security Act does not refer to," let alone require, the Commissioner to grant relief from procedural defaults. The "more natural reading" of Section 405(g), in his view (*ibid.*), is that it refers only "to the kinds of 'final decisions' required by the statute," meaning "decisions on the merits of claims for benefits."

---

[2] There were over 51,000 such dispositions in FY 2018. See perma.cc/83A4-G3UP (select "See the Screenshot View").

That argument proves too much. If amicus were correct that Section 405(g) covers only those statutorily mandated decisions that actually reach and resolve the merits of a claim, then claims that conclude with Appeals Council orders *denying* review—like those that conclude with orders *dismissing* review—would never receive final decisions.

Merits review by the Appeals Council is discretionary. 20 C.F.R. § 416.1467. And it is elemental that a discretionary denial of appellate review "imports no expression of opinion upon the merits of the case." *Teague* v. *Lane*, 489 U.S. 288, 296 (1989) (quoting *United States* v. *Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)). For example, a grant of Appeals Council review could reflect the Commissioner's determination that the case involves "a broad policy or procedural issue that may affect the general public interest." 20 C.F.R. § 416.1470(a)(4). A denial of review may reflect merely the absence of that factor.

In the 86% of cases in which the Appeals Council declines review for any reason,[3] the final order issued by the agency is one that technically does not reach the merits. By extension of amicus's logic (Br. 2, 23), there would be no judicial review in any such case. Indeed, by his logic (Br. 26), the Commissioner could unilaterally allow or foreclose judicial review of any case by simply exercising her discretion to refuse Appeals Council review. That plainly is not the scheme that Congress envisioned for Section 405(g).

The upshot is clear: The Appeals Council decision conclusively resolving petitioner's request for benefits does not lose its character as "final" simply because it is based on procedure rather than the merits.

---

[3] See perma.cc/H25X-9TUT.

b. Even if the Court were to accept amicus's premise (that Section 405(g) confers jurisdiction to review only decisions on the merits), it still would have to reject his conclusion (that judicial review is foreclosed when the Appeals Council dismisses a request for review as untimely).

Several of the circuits that agree with amicus that judicial review is limited to merits decisions have held, as we just suggested, that denials of review by the Appeals Council (not just dismissals) are "non-final agency action[s] not subject to judicial review" because they do not resolve the merits of the claimant's case. *Taylor* v. *Commissioner of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011). Accord, *e.g.*, *Damato* v. *Sullivan*, 945 F.2d 982, 988 (7th Cir. 1991).

But these circuits have not then concluded that there is no final decision and that the claimant cannot seek judicial review. Rather, they have reasoned that, if the Appeals Council refuses to take up a claimant's case on the merits, "the ALJ's decision becomes the final decision of the Commissioner." *Taylor*, 659 F.3d at 1231. Accord, *e.g.*, *Brown* v. *Colvin*, 825 F.3d 936, 939 (8th Cir. 2016) ("The Appeals Council's denial of Brown's request for review made the ALJ's decision the final decision of the Commissioner."); *Damato*, 945 F.2d at 988 (similar). Cf. 20 C.F.R. § 416.1400(a)(5). Were it otherwise, the vast majority of claimants would never receive final, judicially-reviewable decisions.

This reasoning applies equally to Appeals Council dismissals, which share the same basic character as denials. See 20 C.F.R. § 404.968(b). Thus, even if amicus were correct that such decisions are themselves unreviewable under Section 405(g), it would mean only that the ALJ's decision becomes the final, reviewable decision of the Commissioner.

In fact, that is precisely how the agency itself appears to understand the issue. The ALJ informed petitioner that, "[i]f you do not appeal and the Appeals Council does not review my decision on its own, my decision will become final." JA6-7. See also JA7 (notifying petitioner that the ALJ decision would become a "final decision" if the Appeals Council did not review the case).

To be clear, this is not the better approach. The more logical view, we submit, is that Appeals Council dismissals and denials are themselves independently reviewable "final decisions." And judicial review of such a decision permits a look-through to the earlier decision of the ALJ under the general rule that interlocutory orders merge into final decisions. See pages 17-19, *infra*. Our point for present purposes is only that, even if amicus were correct that Section 405(g) confers jurisdiction to review only decisions addressing the merits (Br. 25-26), petitioner would be entitled to seek judicial review of the ALJ's decisions denying him benefits, notwithstanding that the Appeals Council dismissed his appeal as untimely.

c. Neither *Califano* v. *Sanders*, 430 U.S. 99 (1977), nor *Your Home Visiting Nurse Services* v. *Shalala*, 525 U.S. 449 (1999), suggests otherwise. Those cases stand for the unremarkable proposition that once an agency has issued a final decision on a claim for benefits triggering judicial review, a subsequent discretionary denial of administrative reopening is not also judicially reviewable. That makes sense, because judicial review of reopening denials would allow for second bites at the apple, "frustrat[ing] the statutory purpose of imposing a 60-day limit on judicial review of the Secretary's final decision on an initial claim for benefits" and effectively "permitting requests to reopen to be reviewed indefinitely." *Your Home*, 525 U.S. at 454.

The same cannot be said here, where the question is whether petitioner is entitled to judicial review of the agency's final decision on his *initial* claim for benefits. Indeed, amicus's position would create the inverse of the problem present in *Sanders* and *Your Home*, foreclosing even *one* opportunity for judicial review. We made this point in the principal brief (at 18-19), but amicus does not address our reasoning.

B. Section 405(g)'s "after a hearing" requirement is satisfied in this case

Unable to make headway with the words "any final decision," amicus retreats to the phrase "after a hearing." See Br. 27-36. But his arguments on this score are equally unpersuasive.

1. Judicial review is available to challenge "any final decision of the Commissioner of Social Security *made after a hearing*." 42 U.S.C. § 405(g) (emphasis added). *Sanders* held that "hearing" means a hearing required by the statute itself. 430 U.S. at 108. The only hearing required by the statute is a "hearing before an administrative law judge" pursuant to Section 405-(b)(1). *Id.* at 101. Thus, the phrase "after a hearing" means after a Section 405(b)(1) hearing before an ALJ. *Id.* at 108-109.

That is not an obstacle in this case, because petitioner had a Section 405(b)(1) video-conference hearing before an ALJ. See JA8-9; 20 C.F.R. § 416.1436(b) (providing for hearings by video conference). There accordingly cannot be any question that the Appeals Council's final disposition of petitioner's claim for benefits came "after a hearing" within the meaning of Section 405(g).

2. Amicus disagrees. Br. 31-34. While his reasoning is somewhat opaque, he appears to analogize an un-

timeliness dismissal by the Appeals Council to a denial of a motion to reopen, which *Sanders* held is not a decision "after a hearing." See 430 U.S. at 108-109. But again, a dismissal for untimeliness is fundamentally different from a denial of reopening.

Section 405(b)(1) hearings are made available to claimants as an element of the agency's consideration of their initial claims, not otherwise. In this way, Section 405(g)'s hearing requirement reflects "Congress' determination to limit judicial review to the original decision denying benefits." *Sanders*, 430 U.S. at 108.

As we explained in our principal brief (at 18-19), however, motions to reopen ask the agency to "reopen final decisions [already reached]." *Sanders*, 430 U.S. at 108. Such a motion accordingly cannot be resolved "after a hearing" in the Section 405(g) sense because statutorily required hearings are available only for consideration of initial claims. Because the Act "does not [otherwise] require a hearing for requests to reopen" (*Stovic* v. *Railroad Ret. Bd.*, 826 F.3d 500, 503-504 (D.C. Cir. 2016) (Kavanaugh, J.)), orders on motions to reopen cannot come "after a hearing" within the meaning of Section 405(g).

The difference is readily apparent: Unlike reopening, a request for Appeals Council review is the final step in the agency's *initial* resolution of the claimant's application for benefits. *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1237 (11th Cir. 1983). That is no less true when the Appeals Council dismisses a request as untimely rather than denying or granting it.

3. Amicus disputes this yet further. In his view (Br. 34), Section 405(g) can refer only "to a 'final decision' reached 'after a hearing' *on that decision*." As the

Ninth Circuit has suggested, because "the Appeals Council may deny a request for an extension without a hearing" required by the statute, an untimeliness dismissal cannot come "after a hearing" within the meaning of Section 405(g). *Matlock* v. *Sullivan*, 908 F.2d 492, 493-494 (9th Cir. 1990).

That position again proves too much. No hearing of any kind is ever statutorily required of the Appeals Council, regardless whether the Council grants review, denies review, or dismisses the request. By amicus's logic (Br. 34), no decision of the Appeals Council would ever constitute a decision "after a hearing" under Section 405(g) because an Appeals Council decision is never reached after a statutorily required hearing "*on that decision.*" That would foreclose judicial review of all properly exhausted claims altogether.

4. Amicus's stingy construction of "after a hearing" also creates practical difficulties. It was settled in *Salfi* and *Sanders* that Section 405(g)'s hearing requirement does not bar judicial review of questions on which the Commissioner concludes that no hearing is required. *Weinberger* v. *Salfi*, 422 U.S. 749, 767 (1975); *Sanders*, 430 U.S. at 109. This includes, at a minimum, hearings to entertain constitutional challenges over which the Commissioner lacks adjudicative authority. *Ibid.*

Construing "after a hearing" narrowly thus would encourage claimants to route their claims through this carve-out for constitutional arguments by introducing constitutional challenges to the administrative scheme. "Making jurisdiction turn on the presence of a constitutional argument not only lacks support in the text of [Section] 405(g) but also would lead claimants to present unnecessary constitutional arguments." *Boley* v. *Colvin*, 761 F.3d 803, 807 (7th Cir. 2014). A construc-

tion of a statute that affirmatively invites "unnecessary constitutional litigation" is not one that should be favored. *Id.* at 808.

5. We further explained that, under the Court's reasoning in *Salfi* and *Sanders*, the phrase "any final decision * * * after a hearing" can be read to mean a decision reached by "whatever process the Social Security Administration deems adequate to produce a final decision." Pet'r Br. 24 (quoting *Boley*, 761 F.3d at 805). The government agrees. U.S. Br. 28-29. Thus, if the Commissioner "considers a hearing to be useless" and issues a decision without one (as does the Appeals Council in virtually every decision it issues, no matter its character), review is not foreclosed. U.S. Br. 35.

If the Court agrees that petitioner's hearing before the ALJ satisfies Section 405(g)'s hearing requirement, however, it need not reach this issue.

C. *Chevron* deference does not apply in these circumstances

Amicus chides us (Br. 3, 42) for not dedicating more of our principal brief to the question of *Chevron* deference. In his view, deference is warranted because the phrase "any final decision" is "'left undefined by the Act' and delegated to the agency to 'flesh out by regulation.'" Br. 42 (quoting *Salfi*, 422 U.S. at 765-766). As he sees it, "[t]he statute [thus] gives the agency 'complete authority' to specify its meaning 'as [it] deems serve [its] own interests in effective and efficient administration.'" Br. 43 (quoting same).

But amicus ignores the elephant in the room: The government has abandoned the agency's prior interpretation of Section 405(g), acknowledging (U.S. Br. 30) that "SSA's regulations providing that an Appeals Council order dismissing a request for review as un-

timely is not subject to judicial review are inconsistent with the Act and should not be given effect." It would be anomalous, indeed, for this Court to defer to a regulation that the government is no longer willing to defend as lawful.

Besides that, the agency's interpretation is flatly inconsistent with this Court's precedents. Its reading of "final decision" would elevate exhaustion to a jurisdictional requirement—one that the agency alone has the authority to decide. That view cannot be squared with *Eldridge* or *City of New York*. Although the agency is free to establish procedural rules that "serve [its] own interests in effective and efficient administration" (Amicus Br. 43 (quoting *Salfi*, 422 U.S. at 765-766)), it is not free to erect jurisdictional barriers to judicial review that Congress did not intend.

Finally, even if Congress intended the agency to define by regulation the limits of federal court jurisdiction, the agency's discretion would be bounded by established substantive canons of construction. See *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997) (substantive canons "necessarily constrain[] the possible number of reasonable ways to read an ambiguity in [a] statute"). Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (deference is warranted only if an ambiguity remains after "applying the normal 'tools of statutory construction,'" including substantive canons). Here, the "strong presumption that Congress intends judicial review of administrative action" (*Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)) forecloses the agency from picking among the otherwise permissible readings of Section 405(g) the one that most constrains judicial review.

D. The district court may address the merits of petitioner's claim if it overrules or excuses petitioner's failure to exhaust

Although the Solicitor General agrees that orders dismissing Appeals Council review as untimely are reviewable under Section 405(g), he takes the position (U.S. Br. 30) that courts may review only the untimeliness decision itself and "may not go further and review now whether petitioner is entitled to benefits." That is incorrect.

1. As we explained in our principal brief (at 24-25), *Sims* held that judicial review of a "final decision" under Section 405(g) brings up all of the issues in the case, regardless of whether the claimant exhausted each issue before the agency. 530 U.S. at 112. Thus, the ordinary rule under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)—that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (*id.* at 87)—does not apply in the special context of judicial review of final decisions of the Social Security Administration. *Sims*, 530 U.S. at 112.

Pursuant to the concept of merger, that holds true even if the Commissioner's "final decision" consists of a determination that the claimant failed to seek Appeals Council review within the time allowed.

The general rule is that, "when reviewing a final decision, [courts] have authority to review the interlocutory orders that preceded it based on the principle that such orders merge into the final decision." *LeFande* v. *District of Columbia*, 841 F.3d 485, 491 (D.C. Cir. 2016). Cf. *Energy Transfer Partners* v. *FERC*, 567 F.3d 134, 144 (5th Cir. 2009) (applying the merger rule to a "final decision" of an agency). This

Court has suggested that the rule of merger is a corollary of finality. See *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

If, as the Solicitor General concedes, the dismissal of petitioner's request for Appeals Council review is the final agency decision that brought the administrative review process to an end, then under the rule of merger, all of the agency's prior decisions—including the ALJ's rejection of his claim on the merits—merged into that decision, bringing them along for judicial review. Under *Sims*, all such orders are on the table before the district court. Claimants like petitioner may therefore seek review of both the dismissals of their appeals as untimely and the denials of their claims by the ALJ on the merits.

That said, when the Appeals Council dismisses a request for review as untimely, and the claimant later seeks judicial review under Section 450(g)—as did petitioner here—the finding that the claimant failed to exhaust his administrative remedies must be resolved at the threshold. If the government does not waive the issue, the court must decide (1) whether to overrule the Appeals Council's untimeliness decision and hold that administrative remedies were properly exhausted after all, or, if not, (2) whether to excuse or disregard the claimant's non-exhaustion. See *City of New York*, 476 U.S. at 483; *McCarthy*, 503 U.S. at 146-149.

But the court's authority to reach the merits of the underlying claim if the claimant's failure to exhaust is overruled, excused, or waived cannot be denied in light of the statute's express grant of "power to enter * * * judgment affirming, *modifying*, or reversing" the agency's decision (42 U.S.C. § 405(g) (emphasis added)), using "ground-level discretion of the same order as [the agency itself]." *Hudson*, 490 U.S. at 885.

Simply put, whatever the Appeals Council could have done, the district court can do, too.

The government's contrary position—that a court cannot reach the merits of the underlying application for benefits when the agency's final decision is an untimeliness dismissal—depends on the awkward notion (U.S. Br. 25-26) that petitioner actually *did* exhaust his administrative remedies, but only on the question of whether he exhausted his administrative remedies. Even if that oddly self-referential description were an accurate way of characterizing this case, it would make a difference only if petitioner were limited in the district court to pursuing those issues actually exhausted before the agency. But as *Sims* makes clear, that limitation does not apply in this context; once a Social Security claimant is before a federal judge under Section 405(g), he "need not" have exhausted any particular issues "in order to preserve judicial review of those issues." 530 U.S. at 112.

2. The later sentence in Section 405(g), providing for *Chenery*-like review of claims concerning failures "to submit proof in conformity with any regulation," supports our position and not the government's. See U.S. Br. 29-30, 38.

The highlighted language is evidence that, when Congress intends to limit judicial review of particular SSA decisions exclusively to the grounds on which those decisions were resolved, it knows how to do so. Thus, if Congress had intended that result with respect to untimeliness dismissals, "it presumably would have said so," because elsewhere it "sp[oke] in just that way." *Descamps* v. *United States*, 570 U.S. 254, 267-268 (2013). Cf. *Jones*, 549 U.S. at 200 (when Congress means to "depart from the usual procedural requirements, it [does] so expressly"). Yet it did not.

E. A holding in favor of petitioner would have a very modest impact on the federal courts' caseload

Significant portions of amicus's brief (at 15-19) focus not on text, but on Congress's supposed concern about the size of the SSA and the number of claims it must process. That is neither here nor there if the text speaks for itself. And as we and the Solicitor General have shown, it does. Regardless, a reversal of the Sixth Circuit would have a limited effect on the Judiciary's caseload. Were it otherwise, the government surely would have said so.

The Eleventh Circuit has been operating under the rule that we advocate for the past 36 years. Yet its Social Security caseload, as a proportion of its overall civil caseload, is *lower* than the national average: Between June 2017 and June 2018, Social Security cases accounted for 1,755 (5.2%) of the 33,736 total civil cases filed there.[4] That compares with 6.8% of the 281,202 total civil filings throughout the country during the same period.[5] In the circuits where amicus's rule has prevailed, the aggregate share of civil cases filed that were Social Security cases was 6.1%.[6]

---

[4] See perma.cc/M4QZ-LDAB (follow link for download).

[5] See *ibid.* In the Seventh Circuit, Social Security cases accounted for 6.9% of the federal courts' civil docket.

[6] Amicus seriously misreads the data when he asserts (Br. 44) that Social Security cases are "by far the largest category of cases filed each year" in the federal courts. In fact, among the 281,202 federal civil cases filed between June 2017 and June 2018, there were more private personal injury (56,186), state civil rights (39,055), and state prisoner civil rights (27,102) cases than Social Security cases (19,115). See perma.cc/M4QZ-LDAB (follow link for download).

These relatively modest numbers should come as no surprise. Although amicus is correct that the SSA processes "millions of claims every year" (Br. 26), few of those claims are challenged through the administrative review process. Social Security ALJs adjudicated approximately 760,000 challenges in 2018.[7] A modest proportion of those challenges were appealed: In 2018, the Appeals Council received about 153,000 new appeal requests[8] and disposed of about 156,000.[9] Among disposed appeals, the Council granted review in about 22,000 cases (14%) and denied or dismissed the rest.[10] But dismissals were a relatively uncommon form of disposition; the Appeals Council dismissed only about 4,000 cases (2.5%), and among those, only about 2,500 (1.6%) were for untimeliness.[11]

Just 12.5% of timely Appeals Council cases were appealed to the district courts in 2018 (about 19,000 of 153,000 cases). Assuming the same proportion of dismissals for untimeliness were appealed, the result would be slightly more than 300 additional Social Security cases filed nationwide each year.[12] For a judicial system that hears more than 280,000 civil cases annually, that is little more than a rounding error. A

---

[7] See perma.cc/83A4-G3UP (select "See the Screenshot View").

[8] See perma.cc/PQ3P-9FZ5.

[9] See perma.cc/H25X-9TUT.

[10] *Ibid.*

[11] The government's certiorari-stage brief reports these non-public figures at page 29. Cf. perma.cc/75VQ-JXWL (slide 7, showing dismissal rate of 2.8% in 2008).

[12] The government observes (Br. 43 n.17) that there are approximately 6,000 untimeliness dismissals by ALJs each year. Although not an issue presented here, judicial review of those decisions would add perhaps an additional 750 annual court cases.

holding for petitioner accordingly will not "overrun" the federal courts with new Social Security filings (Amicus Br. 12), as the Eleventh Circuit's three decades of experience demonstrate.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511
(203) 432-4992

WOLODYMYR CYBRIWSKY
Cybriwsky Wolodymyr
Law Office
214 South Central Ave.
Prestonsburg, KY 41653
(606) 886-8389

ANDREW J. PINCUS
Counsel of Record
PAUL W. HUGHES
CHARLES A. ROTHFELD
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

---

* The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

No. 17-1606

In the Supreme Court of the United States

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. A Social Security Appeals Council order dismissing a request for review as untimely is judicially reviewable under 42 U.S.C. 405(g) 4
   A. Section 405(g) does not prohibit courts from reviewing whether a claimant exhausted administrative remedies 4
   B. The agency issued a final decision after a hearing 7
   C. Judicial review of Appeals Council dismissal orders will not impose an undue burden on federal courts 13
II. Judicial review of an Appeals Council dismissal order is limited to the stated rationale for the agency's decision 16

TABLE OF AUTHORITIES

Cases:

Bloodsworth v. *Heckler*, 703 F.2d 1233 (11th Cir. 1983) 2, 9, 14
Bowen v. *City of New York*, 476 U.S. 467 (1986) 7, 8, 18, 19, 21
Califano v. *Sanders*, 430 U.S. 99 (1977) 11, 12
Cappadora v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966) 11
Casey v. *Berryhill*, 853 F.3d 322 (7th Cir. 2017) 19
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 12
FTC v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) 20
Heckler v. *Day*, 467 U.S. 104 (1984) 13
Heckler v. *Ringer*, 466 U.S. 602 (1984) 4, 5

Cases—Continued: Page

Herchak v. *U.S. Dep't of Labor*, 125 Fed. Appx. 102 (9th Cir. 2005) 5
INS v. *Orlando Ventura*, 537 U.S. 12 (2002) 20
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 2, 8, 9
Quarles v. *Colvin*, No. 15-572, 2016 WL 4250399 (S.D. Ala. Aug. 10, 2016) 19
Ramey v. *Merit Sys. Prot. Bd.*, 476 Fed. Appx. 253 (Fed. Cir. 2012) 5
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 13
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 3, 20
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 6
Sims v. *Apfel*, 530 U.S. 103 (2000) 7, 13, 20
Stovic v. *Railroad Ret. Bd.*, 826 F.3d 500 (D.C. Cir.), cert. denied, 137 S. Ct. 399 (2016) 11, 12
Sullivan v. *Hudson*, 490 U.S. 877 (1989) 6
T-Mobile S., LLC v. *City of Roswell*, 135 S. Ct. 808 (2015) 21
Townsend v. *Secretary of Health & Human Servs.*, 762 F.2d 40 (6th Cir. 1985) 10
United States v. *Gonzales*, 520 U.S. 1 (1997) 16
Utility Air Regulatory Grp. v. *EPA*, 573 U.S. 302 (2014) 12, 13
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 2, 21
Whitzell v. *Astrue*, 589 F. Supp. 2d 100 (D. Mass. 2008) 19
Your Home Visiting Nurse Servs., Inc. v. *Shalala*, 525 U.S. 449 (1999) 11

Statutes and regulations:

5 U.S.C. 7703(a)(1) 5
42 U.S.C. 405 ..... 2, 6
42 U.S.C. 405(a) 10, 16, 17

Statutes and regulations—Continued: Page

42 U.S.C. 405(b) 10
42 U.S.C. 405(g) ..... *passim*
42 U.S.C. 405(h) 10
42 U.S.C. 1383 17
42 U.S.C. 1383(c)(1)(A) 10
42 U.S.C. 1383(d)(1) 17
49 U.S.C. 42121(b)(3) 6
49 U.S.C. 42121(b)(4) 6
20 C.F.R.:
Section 404.900(b) (1999) 13
Section 416.1400(a) 12
Section 416.1468 17
Section 416.1468(a) 18
Section 416.1470 21
Section 416.1470(a)(5) 14
Section 416.1470(b) 10
Section 416.1475 10
Section 416.1476(b) 10

Miscellaneous:

45 Fed. Reg. 52,078 (Aug. 5, 1980) 17
70 Fed. Reg. 11,420 (Mar. 8, 2005) 17
United States Courts:
Statistical Tables for the Federal Judiciary, https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary (last visited Mar. 6, 2019) 14

Miscellaneous—Continued: Page

U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2017, https://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2017.pdf (last visited Mar. 6, 2019) 14

U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending June 30, 2016, https://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2016.pdf (last visited Mar. 6, 2019) 15

In the Supreme Court of the United States

No. 17-1606

RICKY LEE SMITH, PETITIONER

v.

NANCY A. BERRYHILL,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

The government's opening brief explains that, when the Social Security Administration (SSA) Appeals Council dismissed petitioner's request for review as untimely, the agency issued its "final decision * * * after a hearing" on petitioner's claim for benefits, and the Appeals Council dismissal order is therefore subject to judicial review under 42 U.S.C. 405(g). That result follows from the undisputed facts that the dismissal order marked the agency's last word on petitioner's application for Social Security benefits, that an Administrative Law Judge (ALJ) held a hearing on petitioner's application, and that SSA was not required to conduct another oral hearing to resolve the timeliness of petitioner's request for Appeals Council review. The text of Section 405(g), its place in the structure of the Social Security Act, this Court's precedents, and basic principles of administrative law all confirm that the

Appeals Council's dismissal order was a reviewable final decision.

The Court-appointed Amicus Curiae (Amicus) urges, at bottom, that "[t]he agency and this Court have always understood the statute to require 'exhaustion of the administrative remedies provided.'" Br. 14 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 327 (1976)). But that observation shows why an Appeals Council order dismissing a request for review as untimely is judicially reviewable: the question for the courts in petitioner's case is *whether* he properly attempted to exhaust his administrative remedies, and that type of question is ordinarily resolved by courts, not by agencies in their unreviewable discretion. See Gov't Br. 30-31. Notably, several courts have reviewed administrative exhaustion determinations pursuant to other statutes that, like the Social Security Act, authorize judicial review only after the agency's "final" decision. *Ibid.* The Amicus does not identify any statutory text that compels a departure from standard administrative practice and forecloses judicial review of the limited question whether a claimant properly exhausted administrative procedures. Section 405 does empower SSA to determine the steps that precede the agency's final decision. See *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). But it does not authorize the agency to determine by regulation that, because of its own conclusion regarding an untimely filing, its decision will *never* become final. See *Bloodsworth* v. *Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) (if Appeals Council dismissal orders were not reviewable, then "the claimant would never have a 'final' decision" and would be left "permanently in limbo").

The Amicus's concern (Br. 36) that authorizing judicial review of Appeals Council dismissal orders would

open the "floodgate" on federal courts is unfounded, because Section 405(g) and standard administrative-law principles establish that judicial review in petitioner's case would be limited to the ground the agency gave for its decision, and would be highly deferential, asking only whether the agency made findings supported by substantial evidence and did not abuse its discretion. See Gov't Br. 29-30. Contrary to petitioner's contention (Br. 24-25), a court's authority in this case would not include review of his ultimate entitlement to benefits. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); cf. 42 U.S.C. 405(g) ("the court shall review only the question of conformity with [the agency's] regulations"). Those limitations on judicial review are likely to dissuade many claimants from pursuing litigation over Appeals Council dismissal orders. And indeed, experience in the Eleventh Circuit, which has allowed judicial review of Appeals Council dismissal orders since *Bloodsworth* in 1983, has not shown an unusual volume of Social Security cases.

The Amicus's fallback argument (Br. 40-47) is that the Court should defer to SSA's existing regulations. But for all the reasons given here and in the government's opening brief, accepting judicial review when an ALJ held a hearing and the agency's proceedings are indisputably over is the only reasonable construction of Section 405(g).

I. A SOCIAL SECURITY APPEALS COUNCIL ORDER DISMISSING A REQUEST FOR REVIEW AS UNTIMELY IS JUDICIALLY REVIEWABLE UNDER 42 U.S.C. 405(g)

The government's opening brief explains (at 26-28, 33-37) why the Appeals Council dismissal order in petitioner's case was a "final decision * * * made after a hearing," and therefore subject to judicial review under 42 U.S.C. 405(g). Applying the straightforward meaning of the statutory text, SSA's decision was final because it is undisputed that the agency will take no further action on petitioner's benefits application. And that decision was made after a hearing by an ALJ regarding petitioner's entitlement to benefits. The Amicus essentially urges a unique construction of the terms in Section 405(g), on the ground that SSA processes a very large number of claims each year. But that policy rationale ultimately has no foothold in the statutory text.

A. Section 405(g) Does Not Prohibit Courts From Reviewing Whether A Claimant Exhausted Administrative Remedies

The Amicus repeatedly emphasizes that, due in part to the size of the Social Security program, Congress required claimants to exhaust administrative remedies before filing in court. Amicus Br. 1-2, 4-6, 14, 16-19. The Amicus argues that Congress in Section 405(g) placed limitations on judicial review in order to avoid a "dual * * * or duplicate administration of the law," *id.* at 5-6 (quoting legislative history of the Social Security Act) (citation omitted), and to prevent "overly casual or premature judicial intervention" in the administrative system, *id.* at 18-19 (quoting *Heckler* v. *Ringer*, 466 U.S. 602, 627 (1984)). But those premises are not at issue in this case, which is instead about a court's authority to decide a dispute over administrative exhaustion.

Petitioner's claim for judicial review does not raise any prospect of dual or duplicate administration, or premature judicial intervention, because the agency's proceedings on his benefits application are complete. Nor does the government's interpretation of Section 405(g) call into doubt the need for Social Security claimants to exhaust administrative remedies. Petitioner sought a ruling by the district court that he *did* properly exhaust his remedies in the agency. See J.A. 46-47. In *Ringer*, this Court rejected judicial review because three of the plaintiffs "stood the chance of prevailing in administrative appeals," and a fourth had not yet submitted a reimbursement claim to the agency. 466 U.S. at 627. Petitioner, by contrast, submitted and pursued his claim for benefits through SSA, and at this point—as all agree—he cannot obtain administrative relief without a court's vacatur of the Appeals Council's dismissal order. The Amicus's argument is not that petitioner sought judicial review too soon; it is that petitioner has no opportunity *at all* to have a court review whether he properly pursued administrative relief.

The Amicus's rule would be an outlier. He does not dispute the government's showing (Gov't Br. 30-31) that courts have routinely undertaken judicial review of administrative findings of untimeliness, including pursuant to other statutes that, like the Social Security Act, authorize judicial review only after the agency's "final" decision. See also, *e.g.*, *Ramey* v. *Merit Sys. Prot. Bd.*, 476 Fed. Appx. 253, 255-256 (Fed. Cir. 2012) (per curiam) (reviewing decision of Merit Systems Protection Board finding that petitioner's administrative appeal was untimely, pursuant to statute authorizing judicial review of "a final order or decision of" the Board, 5 U.S.C. 7703(a)(1)); *Herchak* v. *U.S. Dep't of*

Labor, 125 Fed. Appx. 102, 103-107 (9th Cir. 2005) (reviewing decision of Labor Department Administrative Review Board finding that petitioner's administrative appeal from ALJ decision was untimely, pursuant to statute authorizing judicial review of "a final order" of the agency, 49 U.S.C. 42121(b)(3) and (4)). In fact, the Amicus does not identify any instance outside of Section 405 (or other statutes incorporating it) in which courts have interpreted a provision for judicial review of an agency's "final decision" to bar review of an agency's timeliness conclusion. And the Amicus provides no persuasive basis for concluding that Congress intended the term "final decision" in Section 405(g) to mean something different from how that term is used throughout administrative law.

Contrary to the Amicus's contention (Br. 18-19), this Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), does not support giving Section 405(g)'s text a uniquely narrow construction that would bar judicial review of "disputes over the rules of" SSA's administrative process even after the agency's decision is final. The Amicus invokes *Hudson*'s observation that Congress created a "somewhat unusual" provision for judicial review of SSA decisions. 490 U.S. at 885. But that observation concerned the availability of attorney's fees under the Equal Access to Justice Act (EAJA) and the unusual terms of sentence six of Section 405(g), which creates a specialized procedure for an interlocutory remand to the agency for further fact finding or proceedings while the district court retains jurisdiction over the case. See *Shalala* v. *Schaefer*, 509 U.S. 292, 299-300 (1993) (*Hudson*'s allowance of EAJA fees was limited to a "narrow class" of cases in which the district court may remand and retain jurisdiction). *Hudson*

does not support the Amicus's position in this case, which does not involve sentence-six remands or attorney's fees under the EAJA.

B. The Agency Issued A Final Decision After A Hearing

1. *SSA's decision was final.* The Amicus does not dispute that SSA's proceedings in petitioner's case are over, and instead contends that "ordinary usage" and "judicial usage" indicate that the term "final decision" in Section 405(g) is limited to SSA decisions after complete exhaustion of administrative remedies. Amicus Br. 21-23 (citing, *e.g.*, *Bowen* v. *City of New York*, 476 U.S. 467, 482 (1986); *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000); Gov't Br. at 18-19, *Mathews* v. *Sanders*, No. 75-1443 (Sept. 1976)). But each of those authorities simply stated (correctly) that a claimant must proceed through the entire administrative process in order to receive judicial review of the "*merits*" of his "claim for benefits." Gov't Br. at 18, *Sanders*, *supra* (No. 75-1443) (emphasis added). Petitioner's request for judicial review is consistent with that requirement because the appropriate question for the district court in this case is whether his request for Appeals Council review was timely, not whether he is entitled to benefits. None of the authorities cited by the Amicus suggested that an Appeals Council order conclusively resolving a benefits application on a procedural ground is something other than a "final decision." See *id.* at 19 (arguing that the term "final decision" does not include "post-adjudication refusals by the Secretary to reopen closed matters").[1]

---

[1] The government's brief in *Sims*, *supra*, No. 98-9537 (Feb. 2000), cited by the Amicus (Br. 25-26), similarly concerned the requirements necessary to obtain judicial review on the merits. The Amicus also cites (Br. 25-26) the government's brief in *City of New York*,

The Amicus defends his interpretation of the term "final decision" by arguing (Br. 20-21 & n.6) that finality is an "'intensely practical' concept," citing this Court's decision in *Eldridge*, 424 U.S. at 331 n.11, among others. But most of the cases cited concerned whether an administrative decision was "final" notwithstanding the absence of an ALJ hearing or review by the Appeals Council, or else whether to excuse some other deficiency in the underlying proceedings. In *Eldridge*, for example, the Court considered whether SSA had issued a final decision before there was an ALJ hearing or Appeals Council review, thereby permitting a district court to consider the claimant's constitutional argument that he was entitled to an ALJ hearing before his benefits were terminated. See *id.* at 330-332. It was in that context that this Court considered "the consequences of deferment of judicial review." *Id.* at 331 n.11. The Amicus's position here, however, is not that judicial review should be *deferred*, but that judicial review should not be available to petitioner at all. And this case involves the availability of judicial review where the claimant has had an ALJ hearing and received a final disposition of his claim for benefits after requesting Appeals Council review.

The Amicus also relies heavily (Br. 1-2, 24-25, 41) on SSA's authority, recognized by this Court, to specify exhaustion requirements for the administrative process. But again, petitioner does not challenge those requirements; the relevant question in this case is instead whether petitioner complied with them. The

---

supra, No. 84-1923 (Dec. 1985), but that case concerned whether to excuse incomplete exhaustion for certain claimants, and this Court held that exhaustion should be treated as waived under the particular circumstances presented there. See 476 U.S. at 482-486.

authority that Congress granted the agency "to determine *when* finality has occurred," Amicus Br. 24 (quoting *Eldridge*, 424 U.S. at 330) (emphasis added), does not include the authority to cut off a claimant's statutory right to judicial review by saying that SSA's decision in a particular case will never become final. See *Bloodsworth*, 703 F.2d at 1239.

2. *SSA's decision was made after a hearing.* The Amicus acknowledges (Br. 34) that the Appeals Council order dismissing petitioner's request for review was issued after a hearing by an ALJ on petitioner's benefits application. The Amicus's response (Br. 34-35) is that Section 405(g) does not permit judicial review of "collateral" orders that occur after an ALJ hearing. But the text of Section 405(g) depends on whether the agency's decision after a hearing is *final*. And in any event, when petitioner sought Appeals Council review after an ALJ hearing, the Appeals Council's finding of untimeliness was the basis for its final disposition of petitioner's claim, not collateral to it. This Court can resolve this case by holding simply that, when an ALJ has held a hearing on an application for Social Security benefits, judicial review is available after the agency renders its final decision.

The Amicus objects (Br. 34) that the Appeals Council did not hold an *oral* hearing like the one presided over by an ALJ before dismissing petitioner's request for review as untimely. The Amicus contends that Section 405(g)'s "'after a hearing' requirement must be interpreted as referring solely to hearings *required by statute*," and that the statute compels a hearing "'only'" when the claimant timely requests a hearing before an ALJ after an adverse initial determination. Amicus Br.

28 (citation omitted); see 42 U.S.C. 405(b). That argument, based on the absence of a mandatory ALJ-type hearing by the Appeals Council, would bar judicial review of all Appeals Council decisions, on whatever ground. Consider a case where an ALJ determines that a claimant is entitled to benefits, but the Appeals Council overturns that decision on the merits based on its review of the record. See 20 C.F.R. 416.1470(b), 416.1475; see also, *e.g.*, *Townsend* v. *Secretary of Health & Human Servs.*, 762 F.2d 40, 41 (6th Cir. 1985). Surely the Appeals Council's final decision in that case would be subject to judicial review under Section 405(g), see *id.* at 43-44, notwithstanding the fact that the Appeals Council was not required by statute to hold an oral hearing to come to its decision. See 20 C.F.R. 416.1476(b) (Appeals Council has discretion whether to permit oral argument). Presumably the Amicus would also agree that the Appeals Council's decision in such a case would be binding and unreviewable "except as * * * provided" in Section 405(g), even though those requirements are triggered when SSA's "findings and decision" were made "after a hearing," 42 U.S.C. 405(h). See Amicus Br. 16 (emphasizing the limits on judicial review imposed by Section 405(h)).

The Act vests in the Commissioner the authority to determine what procedures should be used by the Appeals Council in making its decision. See 42 U.S.C. 1383(c)(1)(A) (The Commissioner is "authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper."); see also 42 U.S.C. 405(a) and (b). Those discretionary choices do not disturb the claimant's entitlement to judicial review after the agency gives its final decision.

The Amicus argues (Br. 24, 28-34) that its interpretation of Section 405(g), which turns on whether a hearing was required by statute, is supported by this Court's decisions in *Califano* v. *Sanders*, 430 U.S. 99 (1977), and *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449 (1999), as well as the court of appeals' decision in *Cappadora* v. *Celebrezze*, 356 F.2d 1 (2d Cir. 1966) (Friendly, J.). But none of those cases addressed whether a court is barred from reviewing an Appeals Council decision on a non-merits, procedural ground like timeliness when the claimant has had no prior opportunity for judicial review. Instead, all three cases involved claimants who, having previously declined to take advantage of their opportunity for judicial review of an adverse decision, later sought unsuccessfully to *reopen* their cases before the agency. See *Sanders*, 430 U.S. at 102-103; *Your Home*, 525 U.S. at 451; *Cappadora*, 356 F.2d at 2-3. This Court held that a discretionary denial of reopening, after the claimant has already been afforded an opportunity for judicial review, is not a "final decision * * * made after a hearing," 42 U.S.C. 405(g), but is instead "the *refusal* to make a new determination," *Your Home*, 525 U.S. at 453; see *Sanders*, 430 U.S. at 108-109. Central to the Court's analysis was the fact that the statutes at issue did not require the agency to provide a reopening procedure at all. See *Sanders*, 430 U.S. at 108; *Your Home*, 525 U.S. at 454 (noting that "[t]he right of a provider to seek reopening exists only by grace of the Secretary"); see also *Cappadora*, 356 F.2d at 4-5.[2]

---

[2] *Stovic* v. *Railroad Retirement Board*, 826 F.3d 500 (D.C. Cir.) (Kavanaugh, J.), cert. denied, 137 S. Ct. 399 (2016), relied on by the Amicus (Br. 33-34), similarly concerned an administrative refusal to reopen a prior final decision. 826 F.3d at 501. The court of appeals

This Court's decision in *Sanders* stands for the proposition that, after a Social Security claimant has completed the administrative process and been afforded an opportunity for judicial review under 42 U.S.C. 405(g), the agency is permitted to create "an additional opportunity" for administrative proceedings that do not involve a hearing and do not come with a second chance at judicial review. 430 U.S. at 109. But this case is starkly different. Petitioner did not attempt to obtain the benefit of a second administrative process; the Appeals Council dismissal order was the final step in SSA's *first* adjudication of his claim for benefits. See 20 C.F.R. 416.1400(a). Because of that critically different posture, each of the reasons this Court gave for the results in *Sanders* and *Your Home* is inapplicable here. See Gov't Br. 38-40. Nothing in *Sanders* suggests that judicial review of a final decision on a benefits application—as opposed to a reopening request—is foreclosed simply because the Appeals Council ruled on a procedural ground.

3. *SSA's existing regulations do not warrant deference.* The Amicus contends (Br. 3, 12, 15, 40-47) that this Court should defer to the interpretation of 42 U.S.C. 405(g) in the agency's regulations under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As we have explained, however (Gov't Br. 20-21), after reexamining the issue, the government has concluded that the construction of Section 405(g) adopted by SSA's regulations and defended by the Amicus is "'inconsistent with the design and structure of the statute as a whole.'" *Utility*

---

concluded that the agency's decision was reviewable in light of textual differences between the statute at issue and the Social Security Act. *Id.* at 503-505.

Air Regulatory Grp. v. *EPA*, 573 U.S. 302, 321 (2014) (citation and brackets omitted). "Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation.'" *Ibid.* (citation omitted). The regulations' construction of 42 U.S.C. 405(g) depends on the propositions that SSA's decision in petitioner's case was not "final" even though the agency's proceedings were over, or that SSA's decision was not "made after a hearing" even though an ALJ held a hearing. The government has concluded that those are not reasonable constructions of Section 405(g), when read in the context of the statutory scheme and broader principles of administrative law.

C. Judicial Review Of Appeals Council Dismissal Orders Will Not Impose An Undue Burden On Federal Courts

The Amicus urges (Br. 1) that Section 405(g) should be construed to forbid judicial review of exhaustion questions in order to avoid "engulfing the federal courts" in Social Security cases (and Medicare cases, which also incorporate Section 405). See also Amicus Br. 4-5 (noting that SSA processes millions of claims each year), 9-10, 36-40, 44-45. That argument falls short because even as Congress balanced the need for efficiency and fairness in Social Security cases, it preserved judicial review as a backstop. The most important way by which SSA limits the number of Social Security cases that arrive in federal court is affording claimants an "unusually protective multi-step process for the review and adjudication of disputed claims." *Schweiker* v. *Chilicky*, 487 U.S. 412, 424 (1988) (brackets omitted) (quoting *Heckler* v. *Day*, 467 U.S. 104, 106 (1984)). That administrative process is conducted "in an informal, nonadversary manner," *Sims*, 530 U.S. at 111 (opinion of Thomas, J.) (quoting 20 C.F.R. 404.900(b)

(1999)), and includes the Appeals Council, which both exercises appellate-style review and can consider new evidence from the claimant in some circumstances. 20 C.F.R. 416.1470(a)(5); see also Amicus Br. 18 (noting that "the inquisitorial social security process boasts powerful protections for claimants"). In the rare case in which SSA's conclusion regarding the timeliness of a request for Appeals Council review is not supported by substantial evidence, the Amicus provides no persuasive reason why Congress would have barred a court from correcting that error so that the administrative process can resume.

The Amicus's "floodgate concerns" (Br. 36) are also not supported by the experience of the Eleventh Circuit, which has held since 1983 that Appeals Council dismissal orders are subject to judicial review. *Bloodsworth*, *supra*. Statistics from the Administrative Office of the United States Courts show that, from 2001 to 2018, the percentage of Social Security cases filed in district courts in the Eleventh Circuit, as a percentage of all civil cases in that Circuit, was comparable to the national average.[3] For example, for the 12 months preceding June 30, 2017, Social Security cases comprised 6.69% of all civil cases filed within the Eleventh Circuit, and 6.98% of all cases nationwide.[4] The year before that, Social Security cases were 5.30% of the Eleventh

---

[3] https://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary. The Administrative Office's statistics are compiled twice annually and available online from 2001 onward. *Ibid.* For the "June" report in each year, Table C-3 shows "Civil Cases Filed, by Jurisdiction, Nature of Suit, and District" over the preceding 12 months. *Ibid.*

[4] https://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2017.pdf

Circuit's civil filings, compared to 6.34% nationally.[5] The Eleventh Circuit simply has not seen the rush of additional Social Security claims predicted by the Amicus.

Whether judicial review would be available for any other type of SSA dismissal order (Amicus Br. 36-38), or for a decision of any other agency (Amicus Br. 38-40), depends on the particular features of the administrative ruling at issue and the particular text of the relevant statutory regime. Those questions are not before the Court in this case, and some are the subject of disagreement among the lower courts, as the Amicus acknowledges. In any event, where Section 405(g) applies, the government's submission is modest: when the agency has given its last word on an administrative claim, its decision is "final," and where an ALJ hearing occurred and an oral hearing is not required to resolve the particular procedural dispute at issue, the agency's decision was "made after a hearing." 42 U.S.C. 405(g).

The court of appeals erred, therefore, in concluding that petitioner's suit under Section 405(g) should be dismissed without any review of whether he properly exhausted administrative remedies.[6]

---

[5] https://www.uscourts.gov/sites/default/files/data_tables/stfj_c3_630.2016.pdf

[6] The government agrees with the Amicus (Br. 19 n.5) that, if the Court rejects the government's construction of Section 405(g), the judgment below should be affirmed, notwithstanding the court of appeals' erroneous statement that petitioner's case should have been dismissed for lack of jurisdiction. The government raised the point in its opening brief (at 24 n.12) in order to assist this Court, if necessary, in dispelling confusion among some lower courts that have treated exhaustion under Section 405(g) as a jurisdictional requirement.

II. JUDICIAL REVIEW OF AN APPEALS COUNCIL DISMISSAL ORDER IS LIMITED TO THE STATED RATIONALE FOR THE AGENCY'S DECISION

As the government's opening brief explains (at 29-30), Congress understood that some of SSA's final decisions will rest on a procedural failure by the claimant. Section 405(g) accordingly tailors the available scope of judicial review to the agency's rationale for its decision. Where the claimant completes the administrative process, "[t]he court shall have power to enter, * * * a judgment affirming, modifying, or reversing the decision of the Commissioner, * * * with or without remanding the cause for a rehearing." 42 U.S.C. 405(g). But where the agency's final decision is "adverse" to the claimant "because of failure of the claimant * * * to submit proof in conformity with any regulation prescribed under [42 U.S.C. 405(a)], the court shall review only the question of conformity with such regulations and the validity of such regulations." *Ibid.*

A. The latter sentence supports the government's position that, because the Appeals Council in this case issued an adverse decision based on petitioner's failure to submit his request for review in a timely manner, the statute does not entirely foreclose judicial review—as the Amicus contends—but instead limits judicial review to "only" whether petitioner "conform[ed] with" the timeliness regulation. 42 U.S.C. 405(g). Section 405(g) permits limited judicial review of an adverse decision resting on a failure "to submit proof in conformity with *any* regulation prescribed under subsection (a) of this section," *ibid.* (emphasis added), and Congress's use of the "expansive" term "'any'"—"that is, 'one or some indiscriminately of whatever kind'"—"'means what it says,'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)

(citations omitted). The Amicus does not dispute that Section 405(a) is the source of SSA's authority to adopt the Appeals Council timeliness regulation at issue in this case. See 42 U.S.C. 1383(d)(1) (Section 405(a) "shall apply * * * to the same extent" in Title XVI as in Title II); 45 Fed. Reg. 52,078, 52,097 (Aug. 5, 1980) (invoking Section 1383 as authority for 20 C.F.R. 416.1468).[7]

While it is admittedly somewhat awkward to describe a failure to submit a timely request for Appeals Council review as a failure "to submit proof" in conformity with applicable regulations, 42 U.S.C. 405(g), that statutory phrase makes sense in light of the text that it cross references, which refers to SSA's authority to "to make rules and regulations and to establish procedures, * * * and [to] adopt reasonable and proper rules and regulations to regulate and provide for *the nature and extent of the proofs and evidence* and the method of taking and furnishing the same in order to establish the right to benefits hereunder," 42 U.S.C. 405(a) (emphasis added). In other words, Congress referred in Section 405(g) to a failure "to submit proof" because in Section 405(a) it had described the administrative-adjudication process as one for claimants to furnish, and the agency to receive, "proofs and evidence" regarding entitlement to benefits. *Ibid.* The Appeals Council is part of that process, and a claimant's failure to seek Appeals Council review as required by SSA regulations constitutes a

---

[7] The Amicus contends (Br. 26-27 n.7) that "the agency's own regulations" show that the failure-to-submit-proof sentence in Section 405(g) does not apply here, but the Amicus cites a regulation of the Center for Medicare & Medicaid Services—not SSA—that applies to a different benefits program. See 70 Fed. Reg. 11,420, 11,498 (Mar. 8, 2005).

failure to submit his case, based on the evidentiary record, to the Appeals Council. Indeed, the very same timeliness regulation at issue here also counsels claimants to "submit any evidence [they] wish to have considered * * * with [their] request for review [by the Appeals Council]," and provides that the Appeals Council "will consider the evidence" consistent with other SSA regulations. 20 C.F.R. 416.1468(a).

At a minimum, Section 405(g) clearly contemplates that at least some adverse final decisions resting on a procedural ground—those involving the failure to make a proper submission of proof—will be judicially reviewable, contrary to the Amicus's submission (Br. 28) that judicial review is foreclosed unless the agency's decision was reached after a hearing *"required by statute."* Even if the failure-to-submit-proof sentence in Section 405(g) does not strictly control here, the principle underlying it applies equally to petitioner's failure to comply with the regulations governing Appeals Council review.

B. Although the government agrees with petitioner that the Appeals Council's dismissal order is judicially reviewable, petitioner errs in contending (Br. 24-25) that if the district court concludes that the Appeals Council's conclusion regarding untimeliness is not supported by substantial evidence, the court could properly decide petitioner's ultimate entitlement to benefits.[8]

---

[8] Petitioner contends (Br. 24) that the permissible scope of judicial review "is not presented here." But the answer to that question is directly related to why the correct interpretation of Section 405(g) is consistent with this Court's precedents holding that the Social Security Act requires complete exhaustion of administrative remedies before judicial review. See *City of New York*, 476 U.S. at 482. Moreover, the scope-of-review question implicates how the district

Lower courts commonly hold that, where an error in the administrative process prevented SSA from reviewing a claim properly, remand to SSA is the required disposition. See, *e.g.*, *Casey* v. *Berryhill*, 853 F.3d 322, 329 (7th Cir. 2017) (holding that, where the Appeals Council erroneously dismissed an administrative appeal on procedural grounds, "the underlying merits" are "for the agency to consider on remand"); *Quarles* v. *Colvin*, No. 15-572, 2016 WL 4250399, at *3 (S.D. Ala. Aug. 10, 2016) ("The parties * * * agree that, when the Appeals Council has dismissed a request for review, this Court may not review the merits of the underlying decision denying benefits" but only "'whether the Appeals Council abused its discretion in dismissing Plaintiff's tardy request for review.'") (citation omitted); *Whitzell* v. *Astrue*, 589 F. Supp. 2d 100, 109 (D. Mass. 2008) (holding that, where the Appeals Council had erroneously declined review of the claimant's case, Section 405(g) did not allow the court to review the claimant's entitlement to benefits).

Limiting judicial review in a case like this one to the procedural failure that was the basis for the agency's adverse decision is necessary to ensure that petitioner completes the *entire* administrative process—including giving the Appeals Council an opportunity to review the record—before a court considers his claim on the merits. See *City of New York*, 476 U.S. at 482 ("a claimant is required to exhaust his administrative remedies by proceeding through all three stages of the administrative appeals process"). That limitation on the scope of judicial review also accords with the "familiar principle[ ] of administrative law" that when an agency "has

---

court should implement the remand order that both petitioner and the government seek from this Court.

chosen a particular legal rationale" for its decision, "its decision must stand or fall on that basis." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 455 (1986); see also *Chenery*, 318 U.S. at 87.

Petitioner's contrary arguments are without merit. Petitioner first invokes (Br. 24-25) *Sims*, *supra*, which he argues "holds that a court may address an issue in the absence of an Appeals Council determination regarding—or even Appeals Council consideration of—the issue." That overstates *Sims*'s rationale for declining to require issue exhaustion before the Appeals Council. Four Justices reasoned that SSA administrative proceedings operate "'in an informal, nonadversary manner'" whereby "[t]he [Appeals] Council, not the claimant, has primary responsibility for identifying and developing the issues." *Sims*, 530 U.S. at 111, 112 (opinion of Thomas, J.) (citation omitted).[9] But *Sims* does not say or suggest that the Appeals Council is so inconsequential that a court may review the merits without the Appeals Council even considering the benefits claim on the merits.

Reviewing the merits before the Appeals Council has had an opportunity to consider them would also conflict with this Court's "ordinary * * * requirement" that a court "should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam); see also *Chenery*, 318 U.S. at 88 ("a judicial judgment cannot be made to do service for an administrative judgment"). In Social Security cases, SSA regulations charge the Appeals Council with

---

[9] Justice O'Connor concurred in the judgment, on the ground that SSA had failed to notify claimants of an issue-exhaustion requirement. *Sims*, 530 U.S. at 113.

reviewing and clarifying, if needed, the agency's final administrative judgment regarding a claimant's entitlement to benefits, including by receiving new evidence. See 20 C.F.R. 416.1470. Completing that process is necessary before a federal court can appropriately exercise its review of whether the agency's findings on the merits are supported by "substantial evidence." 42 U.S.C. 405(g); see *Salfi*, 422 U.S. at 765 ("Exhaustion is generally required * * * so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review"); see also *T-Mobile S., LLC* v. *City of Roswell*, 135 S. Ct. 808, 815 (2015) ("courts cannot exercise their duty of [substantial-evidence] review unless they are advised of the considerations underlying the action under review") (citation omitted; brackets in original).

Finally, petitioner observes (Br. 25) that, under this Court's precedents interpreting the Social Security Act, full exhaustion can be waived, or deemed waived, in certain situations. But the Acting Commissioner has not waived the requirement in this case that petitioner complete the administrative process before a court reviews his entitlement to benefits. And this Court's precedents would not support treating that requirement as waived here. Were the district court to find that petitioner submitted a timely request for Appeals Council review, he has not shown "that full relief cannot be obtained" through a remand to the Appeals Council, *City of New York*, 476 U.S. at 483 (citation omitted), where petitioner would have an opportunity to present his objections to the ALJ's decision denying his claim for benefits.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MARCH 2019

No. 17-1606

IN THE

Supreme Court of the United States

RICKY LEE SMITH,
Petitioner,

v.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

DEEPAK GUPTA
Counsel of Record
JOSHUA MATZ
DANIEL WILF-TOWNSEND
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

February 4, 2019

QUESTION PRESENTED

In 1939, Congress eliminated general federal-question jurisdiction in social security cases and instead provided that "[n]o findings of fact or decision" of the social security agency "shall be reviewed by any ... tribunal ... except as herein provided." 42 U.S.C. § 405(h). Congress delegated "full power and authority" to the agency to establish procedures "necessary and appropriate" to adjudicate a large number of claims, *id.* § 405(a), and conferred limited jurisdiction on federal courts to review "final decision[s] of the Commissioner of Social Security made after a hearing," *id.* § 405(g).

The Social Security Administration has established a multi-step process for adjudicating claims, culminating in the Social Security Appeals Council. When an applicant fails to request review by the Appeals Council "within the stated period of time" and "the time for filing has not been extended," the Appeals Council "will dismiss [the] request for review." 20 C.F.R. § 416.1471. Under longstanding agency regulations, "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. § 416.1472. The Social Security Act itself does not provide for a hearing on the timeliness of petitions for Appeals Council review.

The question presented is whether the dismissal of a petition to the Social Security Appeals Council as untimely is a "final decision of the Commissioner of Social Security made after a hearing" and thus subject to judicial review under 42 U.S.C. § 405(g).

TABLE OF CONTENTS

Question presented i
Table of authorities iii
Interest of *amicus curiae* 1
Introduction 1
Statement 4
A. Statutory and regulatory background 4
B. Facts and procedural history 10
Summary of argument 12
Argument 14
Orders of the Social Security Appeals Council dismissing requests for review as untimely are not judicially reviewable under section 405(g). 14
I. The agency's longstanding interpretation reflects the best reading of the statute. 15
A. Section 405(g) should be interpreted based on its specific text, context, and structure. 15
B. A "final decision" is a decision on the merits of a claim for benefits following the exhaustion of agency processes. 20
C. A final decision "after a hearing" is a decision on a matter on which the Social Security Act requires a hearing. 27
D. The agency's interpretation of § 405(g) is also supported by longstanding practice in many other contexts. 36
II. The agency's longstanding interpretation is at a minimum reasonable and therefore entitled to deference. 40
Conclusion 47

TABLE OF AUTHORITIES

Cases

A & K Medical Supplies v. Sebelius,
2012 WL 1556530 (C.D. Cal. May 1, 2012) 38

Abramski v. United States,
134 S. Ct. 2259 (2014) 16

Allcare Hospice, Inc. v. Sebelius,
2012 WL 5246512 (E.D. Okla. Oct. 23, 2012).....21

Almy v. Sebelius,
2014 WL 910197 (D. Md. Mar. 7, 2014).....38

Association of Community Organizations for Reform Now (ACORN) v. Illinois State Board of Elections,
75 F.3d 304 (7th Cir. 1996) 21

Astrue v. Capato,
566 U.S. 541 (2012) 15, 41

Athens Community Hospital, Inc. v. Schweiker,
686 F.2d 989 (D.C. Cir. 1982) 40

Barnhart v. Thomas,
540 U.S. 20 (2003) 1, 5, 42, 46

Barnhart v. Walton,
535 U.S. 212 (2002) 3, 41, 43

Batterton v. Francis,
432 U.S. 416 (1977) 41

Bloodsworth v. Heckler,
703 F.2d 1233 (11th Cir. 1983) 45

Boley v. Colvin,
761 F.3d 803 (7th Cir. 2014) 37

Bowen v. City of New York,
476 U.S. 467 (1986) ..... *passim*

Bowen v. Massachusetts,
487 U.S. 879 (1988) 17

Brandyburg v. Sullivan,
959 F.2d 555 (5th Cir. 1992) 33, 37, 39

Brown v. Sullivan,
932 F.2d 1243 (8th Cir. 1991) 38

Califano v. Sanders,
430 U.S. 99 (1977) ..... *passim*

Cambridge Hospital Association v. Bowen,
629 F. Supp. 612 (D. Minn. 1986) 40

Cappadora v. Celebrezze,
356 F.2d 1 (2d Cir. 1966) ..... *passim*

Courtney v. Choplin,
195 F. Supp. 2d 649 (D.N.J. 2002) 38

Davis v. Richardson,
460 F.2d 772 (3d Cir. 1972) 7

Davis v. Schweiker,
665 F.2d 934 (9th Cir. 1982) 38

Doe v. Secretary of Health & Human Services,
744 F.2d 3 (1st Cir. 1984) 37

Dozier v. Bowen,
891 F.2d 769 (10th Cir. 1989) 37

Ellis v. Blum,
643 F.2d 68 (2d Cir. 1981) 33

Entergy Corp. v. Riverkeeper,
556 U.S. 208 (2009) 3, 42

Estate of Lego v. Leavitt,
244 F. App'x 227 (10th Cir. 2007) 39

Filice v. Celebrezze,
319 F.2d 443 (9th Cir. 1963) 7, 23

Giacone v. Schweiker,
656 F.2d 1238 (7th Cir. 1981) 18, 38

Gianforti v. Ribicoff,
200 F. Supp. 450 (W.D.N.Y. 1961) 7

Heckler v. Ringer,
466 U.S. 602 (1984) 3, 18, 19, 26

Heckler v. Day,
467 U.S. 104 (1984) 19

Hensley v. Califano,
601 F.2d 216 (5th Cir. 1979) 38

Herman v. Local 305, National Post Office Mail Handlers, LIUNA, AFL-CIO,
214 F.3d 475 (4th Cir. 2000) 20

Hilmes v. Secretary of Health & Human Services,
983 F.2d 67 (6th Cir. 1993) 37

Hobby v. Hodges,
215 F.2d 754 (10th Cir. 1954) 7

I.C.C. v. Brotherhood of Locomotive Engineers,
482 U.S. 270 (1987) 17

John Muir Memorial Hospital, Inc. v. Califano,
457 F. Supp. 848 (N.D. Cal. 1978) 40

Kasten v. Saint-Gobain Performance Plastics Corp.,
563 U.S. 1 (2011) 23

Kontrick v. Ryan,
540 U.S. 443 (2004) 19

Lamar, Archer & Cofrin, LLP v. Appling,
138 S. Ct. 1752 (2018) 23

Latona v. Schweiker,
707 F.2d 79 (2d Cir. 1983) 33

Lenox Hill Hospital v. Shalala,
131 F. Supp. 2d 136 (D.D.C. 2000) 40

Losh v. Fabian,
592 F.3d 820 (8th Cir. 2010) 20

Mach Mining, LLC v. EEOC,
135 S. Ct. 1645 (2015) 17

Mathews v. Eldridge,
424 U.S. 319 (1976) ..... *passim*

Maxwell v. Commissioner of Social Security,
2013 WL 298267 (M.D. Fla. Jan. 25, 2013) 45

McCall v. Bowen,
832 F.2d 862 (5th Cir. 1987) 37

Miami General Hospital v. Bowen,
652 F. Supp. 812 (S.D. Fla. 1986) 40

Morris v. Berryhill,
2017 WL 600089 (M.D. Ala. Feb. 14, 2017) 45

Nelson v. Secretary of Health & Human Services,
927 F.2d 1109 (10th Cir. 1990) 38

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019) 17

Penner v. Schweiker,
701 F.2d 256 (3d Cir. 1983) 37

Peterson v. Califano,
631 F.2d 628 (9th Cir. 1980) 25, 33, 37

Powerex Corp. v. Reliant Energy Services, Inc.,
551 U.S. 224 (2007) 21

QinetiQ US Holdings, Inc. & Subsidiaries v. Commissioner of Internal Revenue,
845 F.3d 555 (4th Cir. 2017) 17

Rios v. Secretary of Health, Education & Welfare,
614 F.2d 25 (1st Cir. 1980).....25, 38

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 16

Ross v. Blake,
136 S. Ct. 1850 (2016) 16

Russell-Murray Hospice, Inc. v. Sebelius,
724 F. Supp. 2d 43 (D.D.C. 2010).....40

Sackett v. EPA,
566 U.S. 120 (2012) 17

Saline Community Hospital Association v. Secretary of Health & Human Services,
744 F.2d 517 (6th Cir. 1984) 40

Schweiker v. Chilicky,
487 U.S. 412 (1988) 4, 5

Schweiker v. Gray Panthers,
453 U.S. 34 (1981) 41

Sheehan v. Secretary of Health, Ed. & Welfare,
593 F.2d 323 (8th Cir. 1979) 7, 33

Shepherd v. Commissioner,
147 F.3d 633 (7th Cir. 1998) 20

Sims v. Apfel,
530 U.S. 103 (2000) ..... *passim*

Smith v. Heckler,
761 F.2d 516 (8th Cir. 1985) 25

Stovic v. Railroad Retirement Board,
826 F.3d 500 (D.C. Cir. 2016) 3, 13, 33, 34

Stutson v. United States,
516 U.S. 163 (1996) 44

Sullivan v. Hudson,
490 U.S. 877 (1989) 18, 19, 42

Sumy v. Schlossberg,
777 F.2d 921 (4th Cir. 1985) 21

Tucker v. Sebelius,
2010 WL 2761525 (D.N.J. July 12, 2010) 38

Tudor on Behalf of Sanders v. Shalala,
863 F. Supp. 119 (E.D.N.Y. 1994) 38

Turner v. Bowen,
862 F.2d 708 (8th Cir. 1988) 37

Utility Air Regulatory Group v. EPA,
573 U.S. 302 (2014) 16, 25

Weinberger v. Salfi,
422 U.S. 749 (1975) ..... *passim*

White v. Schweiker,
725 F.2d 91 (10th Cir. 1984) 37

Wright v. Colvin,
2013 WL 5567409 (M.D. Fla. Oct. 9, 2013) 45

Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449 (1999) 23, 41, 46

Statutes and regulations

30 U.S.C. § 923 9

42 U.S.C. § 1009 9

42 U.S.C. § 1381a 10

42 U.S.C. § 1395cc 9

42 U.S.C. § 1395ff 9, 38

42 U.S.C. § 1395ii 40

42 U.S.C.§ 1395*oo*(a) 24, 39

42 U.S.C. § 1395*oo*(f)(1) 40

42 U.S.C. § 1395w-114 9

42 U.S.C. § 1395w-22 ..... 9, 39

42 U.S.C. § 1396i 9

42 U.S.C. § 405(a) ..... i, 1

42 U.S.C. § 405(g) ..... *passim*

42 U.S.C. § 405(h) ..... *passim*

Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 6

20 C.F.R. § 404.900(b) 2

20 C.F.R. § 408.1050 10

20 C.F.R. § 416.1400 ..... 5, 7

20 C.F.R. § 416.1403 ..... 7, 25

20 C.F.R. § 416.1448(b)(i) 35

20 C.F.R. § 416.1471 i

20 C.F.R. § 416.1472 ..... i, 2, 25

20 C.F.R. §§ 416.1467–82 10

20 C.F.R. §§ 416.1471–72 8

20 C.F.R. §§ 418.3665–70 10

42 C.F.R. § 405.1136 27

42 C.F.R. § 405.1836 39

42 C.F.R. §§ 405.1114–16 10

45 Fed. Reg. 52,078 (Aug. 5, 1980) 7, 8

64 Fed. Reg. 57,687 (Oct. 26, 1999) 8

Legislative materials

Hearings on Social Security before the House Committee on Ways and Means, 76th Cong., 1st Sess. (1939) (testimony of Dr. Arthur J. Altmeyer, Chairman of the Social Security Board). 6

Report of the Social Security Board to the President, Proposed Changes in the Social Security Act, H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939) 5

Other authorities

Frank S. Bloch, *Social Security Law and Practice* (2012) 4, 5

New Court Sought for Benefit Cases, N.Y. Times, Mar. 9, 1986 8

Antonin Scalia, *A Matter of Interpretation* (1997) 16

Social Security Administration,
Annual Statistical Supplement to the Social Security Bulletin, 2017 (March 2018).....4

Social Security Administration,
Fact Sheet on Social Security 4

United States Courts, Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017 44

U.S. Department of Health and Human Services,
2016 CMS Statistics Reference Booklet 45

INTEREST OF *AMICUS CURIAE*

This Court invited Deepak Gupta "to brief and argue this case, as *amicus curiae*, in support of the judgment below." Consistent with the regulations and longstanding interpretation of the Social Security Administration, the Sixth Circuit held below that orders of the Social Security Appeals Council that "dismiss untimely petitions for review" are "not final decisions reviewable in federal court." Pet. App. 8a.

INTRODUCTION

"[T]he Social Security hearing system is probably the largest adjudicative agency in the western world." *Barnhart v. Thomas*, 540 U.S. 20, 28–29 (2003). Congress sought to design a system capable of fairly adjudicating millions of small claims—without engulfing the federal courts. To that end, Congress delegated "full power and authority" to the Social Security Administration to "establish procedures" that it deems "necessary or appropriate" to dispose of a huge volume of claims. 42 U.S.C. § 405(a). At the same time, Congress divested the federal courts of their ordinary federal-question jurisdiction in social security cases, *id.* § 405(h), requiring judicial review only of "final decision[s] of the Commissioner of Social Security made after a hearing," *id.* § 405(g). The question presented is whether that limited category includes dismissals of untimely petitions to the Appeals Council (the final level within the agency).

As this Court has repeatedly recognized, § 405(g) "does not define 'final decision,' instead leaving it to the SSA to give meaning to that term through regulations." *Sims v. Apfel*, 530 U.S. 103, 106 (2000); *see also Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) ("The term 'final decision' is not only left undefined by the Act, but its

meaning is left to the Secretary to flesh out by regulation."). Under regulations in place for decades, claimants must properly exhaust all three levels of review within the agency before they receive a final decision subject to judicial review. Thus, the Appeals Council's dismissal of an untimely appeal is not a "final decision" "made after a hearing" under § 405(g). *See* 20 C.F.R. § 416.1472.

This long-held position embodies the best reading of the statute. Read in the context of the overall statutory scheme, a "final decision" is a decision on the merits of a benefits claim following the exhaustion of agency processes. That is exactly what Solicitor General Bork told this Court forty years ago: "That phrase, incorporating as it does a requirement of exhaustion of administrative remedies, necessarily refers to the final disposition of a claim for benefits on its merits." U.S. Br. 18–19, in *Califano v. Sanders*, 430 U.S. 99 (1977) (No. 75-1443). And it is how the courts, including this one, have understood the statute: "if a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review." *Sims*, 530 U.S. at 107 (citing 20 C.F.R. § 404.900(b) ("[I]f you . . . do not take the next step within the stated time period . . . you will lose . . . your right to judicial review."). "Only a claimant who proceeds through all three stages receives a final decision." *Bowen v. City of New York*, 476 U.S. 467, 482 (1986).

The phrase "after a hearing" likewise has a settled meaning. Half a century ago, Judge Friendly concluded that the most reasonable way to read it is as referring only to matters on which a hearing is "made mandatory" by the Social Security Act, "not to [decisions] which could lawfully have been made without any hearing at all."

Cappadora v. Celebrezze, 356 F.2d 1, 4 (2d Cir. 1966). Adopting that reading at the government's urging, this Court has held that § 405(g)'s hearing requirement is not satisfied if the claimant's request "may be denied without a hearing," or where a hearing is afforded under "regulations and not by the Social Security Act." *Sanders*, 430 U.S. at 108. Then-Judge Kavanaugh has described this restriction in § 405(g) as "critical," and as not requiring judicial review when "the Social Security Act does not require a hearing." *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503–04 (D.C. Cir. 2016). Section 405(g), then, is best read as limiting review to merits decisions, after exhaustion, on which the Act requires a hearing. That interpretation undergirds the agency's regulations.

At a minimum, those regulations are controlling because they reflect "a reasonable interpretation of the statute." *Entergy Corp. v. Riverkeeper*, 556 U.S. 208, 218 (2009). Although this Court's precedents hold that *Chevron* provides an "appropriate legal lens" here, *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), the parties have not even attempted to show that the statute *unambiguously* compels their reading. The Solicitor General says nothing about this Court's jurisprudence on deference. And the petitioner does so only in passing, contending that any ambiguity should be resolved not by the agency but by resort to "a presumption in favor of judicial review." Petr. Br. 20. That presumption, however, has no place here. *See* 42 U.S.C. § 405(h). While "[i]n the best of all worlds, immediate judicial access [for all claimants] might be desirable," Congress "struck a different balance," "requiring that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place." *Heckler v. Ringer*, 466 U.S. 602, 627 (1984). That balance should be respected.

STATEMENT

A. Statutory and regulatory background

1. The Social Security Administration is one of the largest agencies in the federal government, paying out approximately $1 trillion in benefits annually—roughly five percent of the gross domestic product of the United States. *See* SSA, *Fact Sheet on Social Security*, at 1.[1] The agency pays benefits to approximately 63 million people, each of whom receives an average monthly payment of $1,296. *Id.*[2] "Millions of claims are filed every year and hundreds of thousands of claims are contested through three levels of administrative review." Frank S. Bloch, *Social Security Law and Practice* 22 (2012).

Processing this massive number of social security claims requires an "administrative structure" that "affects virtually every American" and is "of a size and extent difficult to comprehend." *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988). On an annual basis, the Social Security Administration processes approximately 5.5 million old-age and survivors' insurance claims, 2.8 million disability insurance claims, and 2.1 million applications for supplemental security income. *See* SSA, *Annual Statistical Supplement to the Social Security Bulletin, 2017*, at 2.77 (March 2018).[3]

The agency processes those claims "in an informal, non-adversarial manner" designed to ensure that claimants receive benefits whenever they are due. 20

---

[1] https://perma.cc/4U73-G2G4.

[2] The figure $1,296 is the average across retired workers, disabled workers, dependents, and survivors.

[3] https://perma.cc/3KV5-LJXY.

C.F.R. § 416.1400(b). "There are four levels of administrative decision-making for Social Security claims—the initial decision plus up to three stages of administrative review—and most claims must pass through each before a decision is subject to judicial review." Bloch, *Social Security Law and Practice* 22. Under the agency's usual procedures, applicants are entitled to an initial determination, a reconsideration of that determination, a hearing before an administrative law judge, and an appeal to the agency's Appeals Council. *See* 20 C.F.R. § 416.1400. The result is that the Social Security Administration oversees "an unusually protective multi-step process for the review and adjudication of disputed claims." *Schweiker*, 487 U.S. at 424.

From the agency's inception in 1935, Congress and the Social Security Administration have had to confront the question of how to "handle a large number of small claims," balancing the need for fair adjudication with the time and expense required for additional layers of review. *Report of the Social Security Board to the President, Proposed Changes in the Social Security Act*, H.R. Doc. No. 110, 76th Cong., 1st Sess., 11 (1939). As this Court has noted, given the sheer scale of the Social Security hearing system, "[t]he need for efficiency is self-evident." *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003).

Asked to provide guidance to Congress shortly after the agency's creation, the Board of the Social Security Administration recommended that Congress follow the government's prior experience with large-scale programs, like the administration of veterans' benefits, and enact a law requiring the availability of judicial review in only a small set of circumstances. *Id.* As the Chairman of the Social Security Board put it, "where there is a volume

of small claims," judicial review risks "a dual administration, or duplicate administration of the law." 3 *Hearings on Social Security before the House Committee on Ways and Means*, 76th Cong., 1st Sess., 2288 (1939) (testimony of Dr. Arthur J. Altmeyer, Chairman of the Social Security Board).

2. Congress implemented the Board's recommendation with the Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360. That Act codified provisions for the judicial review of social security determinations that have remained in effect to this day. *See id.* §§ 205(g), (h); 42 U.S.C. §§ 405(g), (h).

To avoid depleting the resources of the agency and the judiciary, Congress completely withdrew agency determinations from the general statutes governing federal jurisdiction—including 28 U.S.C. § 1331. *See* 42 U.S.C. § 405(h). Using sweeping language, Congress provided that "[n]o findings of fact or decision of the [agency] shall be reviewed by any person, tribunal, or governmental agency except as herein provided." *Id.* Congress then guaranteed judicial review only in limited circumstances, where a claimant had exhausted all remedies to obtain a "final decision of the [agency] made after a hearing." *Id.* § 405(g). Consistent with its vision of linking judicial review to full compliance with the agency's own procedures, Congress did "not define 'final decision,' instead leaving it to the SSA to give meaning to that term through regulations." *Sims v. Apfel*, 530 U.S. 103, 106 (2000).

3. For decades, the Social Security Administration has held the view that the phrase "final decision . . . made after a hearing" in § 405(g) "grants the district courts jurisdiction to review only substantive determinations

denying benefits." U.S. Br. 20, in *Califano v. Sanders*, No. 75-1443. Before 1980, when this position was codified in regulations, the agency took that stance in litigation. The Solicitor General, for example, argued to this Court that "final decision" in § 405(g) "necessarily refers to the final disposition of a claim for benefits on its merits." *Id.* at 18; *see also Sheehan v. Sec'y of Health, Ed. & Welfare*, 593 F.2d 323, 325 (8th Cir. 1979) (explaining that 405(g)'s "final decision" language precludes review where a claim has been dismissed due to an untimely appeal).

In the pre-regulation period (1939–1980), this interpretation of § 405(g) was also accepted by federal courts in a variety of contexts. *See, e.g.*, *Hobby v. Hodges*, 215 F.2d 754, 757 (10th Cir. 1954) (res judicata); *Gianforti v. Ribicoff*, 200 F. Supp. 450, 452 (W.D.N.Y. 1961) (untimely request for review); *Filice v. Celebrezze*, 319 F.2d 443, 445 (9th Cir. 1963) (denial of request to reopen case); *Davis v. Richardson*, 460 F.2d 772, 775 (3d Cir. 1972) (same); *Sheehan*, 593 F.2d at 325 (untimely request for review).

In 1980, the agency formally adopted regulations that reflected the general consensus. *See* 45 Fed. Reg. 52078 (Aug. 5, 1980). The agency noted that "[u]nder existing law, a person may seek judicial review only if he or she has received an adverse initial determination and has exhausted his or her rights to administrative review." *Id.* at 52079. The regulations therefore define the agency's "final decision" as the decision made after a claimant has "completed the steps of the administrative review process." 20 C.F.R. § 416.1400(a)(5).

The regulations also specify a variety of procedural decisions that do not qualify as a final decision. *See, e.g.*, 20 C.F.R. 416.1403(a). Most relevant to this case, the

regulations specify that the Appeals Council will dismiss a request for review that is not timely filed, and that such a dismissal "is binding and not subject to further review." 20 C.F.R. §§ 416.1471–72; *see also* 45 Fed. Reg. 52,078, 52,096, 52,104 (Aug. 5, 1980). The regulations "make a clear distinction in regard to rights of judicial review between dismissals and determinations on the merits by the Appeals Council." 64 Fed. Reg. 57,687, 57,689 (Oct. 26, 1999). As the agency has noted, this distinction reflects its established position "that an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" under 42 U.S.C. § 405(g). *Id.* These regulations have remained in effect from 1980 through today.

Even as the agency's regulations remained constant, the number of claims it handled continued to swell, sparking concern that federal courts were "deluged with cases filed by people removed from the disability rolls." *See New Court Sought for Benefit Cases*, N.Y. Times, Mar. 9, 1986. In December 1985, for instance, there were 52,795 Social Security cases pending in district courts, a number that had more than doubled in only three years. *Id.* These numbers led to proposals for the creation of a "Social Security Court" that could handle the tens of thousands of federal court cases generated by disputed claims and their associated appeals. *Id.* Ultimately, Congress declined to create a new court, relying instead on the existing provisions in sections 405(g) and (h) to limit the burden on the federal courts.

4. This confidence in § 405(g) was based on decades of experience. Throughout that period, § 405(g) had been interpreted as guaranteeing judicial review only in limited circumstances as described above, rather than

authorizing broad review. Congress not only left § 405(g) in place when it amended or reenacted the Social Security Act over the years, but also expressly incorporated § 405(g) into more than a dozen additional statutes, including:

- 42 U.S.C. § 1395ff (claims for benefits under Medicare Parts A and B)
- 42 U.S.C. § 1395w-22 (benefits under Medicare Part C)
- 42 U.S.C. § 1395w-114 (subsidies under Medicare Part D)
- 42 U.S.C. § 1395cc (eligibility of Medicare providers)
- 42 U.S.C. § 1396i (compensation for certain Medicaid providers)
- 42 U.S.C. § 1009 (special benefits for certain World War II veterans)
- 30 U.S.C. § 923 (claims by miners suffering from black lung)

A compendium of these statutory provisions is set forth in an appendix to this brief. As this list of provisions indicates, § 405(g) has been incorporated into programs requiring the government to administer massive numbers of claims (*e.g.*, Medicaid and Medicare), and also into more targeted benefits programs (*e.g.*, those for injured miners or war veterans).

Many of these programs, in turn, have regulations implementing the term "final decision . . . after a hearing" that mirror those of the Social Security Administration. The Medicare Appeals Council, for instance, similarly provides by regulation that untimely appeals from determinations under Medicare Parts A

and B may be dismissed, and that such dismissals are "not subject to further review." 42 C.F.R. §§ 405.1114–16. Similar regulations govern appeals from subsidy determinations under Medicare Part D. *See* 20 C.F.R. §§ 418.3665–70. And some regulations simply apply the Social Security Appeals Council's rules directly, mimicking the statutory incorporation of 42 U.S.C. § 405(g). *See* 20 C.F.R. § 408.1050 (incorporating 20 C.F.R. §§ 416.1467–82).

The net result is that the claims processing regimes of numerous massive federal benefits programs adopt the understanding of 405(g) that the Social Security Administration has adhered to for decades.

B. Facts and procedural history

1. From 1988 to 2004, petitioner Ricky Lee Smith received disability benefits from the Social Security Administration. J.A. 10. In 2004, he was found to be ineligible for further benefits because he had too many financial resources. *Id.*; *see also* 42 U.S.C. § 1381a (providing that a claimant's entitlement to benefits depends in part on "income and resources"). Eight years later, he filed a new application for benefits, which was denied initially on September 6, 2012, and denied on reconsideration on December 6, 2012. J.A. 8. At Mr. Smith's request, an ALJ held a hearing regarding his claim; the ALJ denied his application for benefits on March 26, 2014. J.A. 23. Mr. Smith was sent a notice of decision that told him he had 60 days to file an appeal with the Appeals Council. J.A. 5.

The Social Security Administration does not have a record of receiving Mr. Smith's appeal to the Appeals Council until months after this deadline had run, when it

received a fax dated September 21, 2014, that contained a copy of a letter dated April 24, 2014. *See* J.A. 30–38 (fax); J.A. 24–29 (letter). A claims representative at the Social Security Administration responded to the fax by filling out a request for review on behalf of Mr. Smith and filing it with the Appeals Council. J.A. 38–39. The Appeals Council found that his claim was not timely filed and found "no good cause to extend the time for filing"—and, accordingly, dismissed Mr. Smith's request for review. J.A. 40–42. Mr. Smith, however, alleges that he timely filed his appeal on April 24, 2014. J.A. 46.

2. Mr. Smith then filed a complaint in federal district court. J.A. 45–47. He alleged that he timely appealed on April 24, and that he "has exhausted all of his administrative remedies." J.A. 46. He therefore asked the court "to review . . . the final decision of the Commissioner holding that the Plaintiff is not entitled to a period of disability," alleging that the determination that he was not disabled "was not supported by substantial evidence." J.A. 46–47. The district court dismissed the complaint for lack of jurisdiction, granting the government's motion to dismiss on the ground that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review" under 42 U.S.C. § 405(g). Pet. App. 25a.

3. The Sixth Circuit affirmed on the same grounds, noting that this understanding of 405(g) is consistent with this Court's precedent and the interpretations of every federal circuit court to consider the issue apart from the Eleventh Circuit. Pet. App. 6a–7a.

4. Mr. Smith sought certiorari in this Court. While that request for certiorari was pending, the Office of the

Solicitor General "reexamined the question and concluded that its prior position was incorrect." SG Br. 22. Although the Solicitor General states that "the government" has changed its position, *id.*, its brief is not signed by any attorneys of the Social Security Administration, and *amicus* is unaware of any announcement by the agency that it has reconsidered its views in light of its own understanding of the administrative scheme.

This Court granted the petitioner's request for certiorari, and appointed *amicus* to argue in support of the judgment below.

SUMMARY OF ARGUMENT

I.A. Section 405(g) must be—and always has been—interpreted by reference to its role in the overall statutory plan. In passing the Social Security Act, Congress created a massive, inquisitorial system to process millions of disability claims. It layered many procedural safeguards for claimants throughout the administrative structure. To prevent federal courts from being overrun, Congress also enacted § 405(g), which defines the circumstances in which claimants are entitled to judicial review. The parties give that context short shrift, relying heavily on background presumptions drawn from the APA. But as this Court has emphasized, the Social Security Act contemplates a scheme of judicial review alien to conventional APA practice. It does so to strike a balance between fairness to applicants and preserving judicial and administrative efficacy.

B. To that end, § 405(g) guarantees judicial review only for decisions that are "final" and "made after a hearing." In context, a "final decision" is a decision on the merits of a claim for benefits following exhaustion of

agency processes. Although "final" has many meanings, this is the one most faithful to the statute. It is also the reading that was advanced by Solicitor General Bork in this Court, that is consistent with the way this Court has described exhaustion under § 405(g) and related statutes in the Medicare context, and that comports with the vast majority of lower-court interpretations.

C. A final decision "after a hearing" is a decision on a matter on which the Act requires a hearing. Fifty years ago, Judge Friendly acknowledged that § 405(g) could be read literally to apply to *any* final decision handed down after a hearing. But, in view of the overall statutory structure, the unique nature of the social security agency process, and Congress's imposition of a hearing requirement in § 405(b), he concluded that the best reading was narrower: the statute applies only where the Social Security Act itself makes a hearing mandatory. At the urging of the Solicitor General, and in express reliance on Judge Friendly's analysis, this Court adopted that reading in *Califano v. Sanders*, 430 U.S. 99, 108 (1977). *Sanders* made clear that the statute does not require review where the claimant's contention "may be denied without a hearing" or where the hearing is "afforded by the Secretary's regulations and not by the Social Security Act." *Id.*; *see also Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503–04 (D.C. Cir. 2016) (Kavanaugh, J.) (same).

D. The agency's interpretation of § 405(g) is not only the best reading on its own terms, but it is also supported by administrative practice and judicial decisions in other contexts. In social security cases, courts have declined to review many other procedural determinations based on the same reading of § 405(g). And in cases arising under

other statutes that incorporate § 405(g)—including the Medicare Act—courts have also embraced that reading.

II. At a minimum, the agency's longstanding interpretation of § 405(g), as reflected in its regulations, is reasonable and entitled to deference. Although this Court has repeatedly deferred to social security regulations, the parties largely ignore their burden to show that the statute unambiguously forecloses the agency's position. But this Court has itself acknowledged the statute's ambiguity and the agency's role in fleshing out its meaning. The agency's expertise, its practical understanding, and the consistency and longevity of its position also support deference here. Finally, the benefits of requiring review for claimants are unjustified in light of the costs for the agency and the courts—and, potentially, even for the claimants themselves.

ARGUMENT

ORDERS OF THE SOCIAL SECURITY APPEALS COUNCIL DISMISSING REQUESTS FOR REVIEW AS UNTIMELY ARE NOT JUDICIALLY REVIEWABLE UNDER SECTION 405(G).

The Social Security Act confers jurisdiction on the federal courts to review "final decision[s] of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). The agency and this Court have always understood the statute to require "exhaustion of the administrative remedies provided." *Mathews v. Eldridge*, 424 U.S. 319, 327 (1976). "Only a claimant who proceeds through all three stages receives a final decision from the Secretary." *Bowen v. City of New York*, 476 U.S. 467, 482 (1986).

In keeping with that understanding, the agency's regulations have provided since 1980 that orders of the Social Security Appeals Council dismissing requests for review as untimely are not judicially reviewable under 405(g). *See* 20 C.F.R. § 416.1472; *id.* § 416.1403(a)(8). These regulations are not "manifestly contrary to the statute." *Astrue v. Capato*, 566 U.S. 541, 558 (2012). Under this Court's precedents, because "[t]he SSA's interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable," it is "entitled to this Court's deference." *Id.*

The parties fall short of carrying their burden to show either that the statute unambiguously compels a contrary reading or that the agency's longstanding interpretation is unreasonable. In fact, the Social Security Administration's longstanding position embodies the best reading of the Act. Section 405(g) requires judicial review only of decisions on the merits, where the Act provides for a hearing and the claimant has exhausted the agency's multi-step administrative process. Section 405(g) does *not* mandate that federal courts sit in judgment of every procedural ruling concerning compliance with the agency's internal exhaustion rules. This reading of § 405(g) is supported by decades of decisions under both the Social Security Act and the statutes and regulations governing other large-scale benefits programs.

I. The agency's longstanding interpretation reflects the best reading of the statute.

A. Section 405(g) should be interpreted based on its specific text, context, and structure.

Interpretation of § 405(g)—like the interpretation of any statute—"begins with the text." *Ross v. Blake*, 136 S.

Ct. 1850, 1856 (2016). In that enterprise, of course, "context is everything." A. Scalia, *A Matter of Interpretation* 37 (1997). Courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). Therefore, "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 312 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Section 405(g) cannot be properly interpreted without due regard for the context in which it arose: the creation of a massive, quasi-judicial process for adjudicating millions of small social security claims, with express restrictions on the circumstances in which judicial review must be allowed. Consistent with that goal, Congress imposed two limits on judicial review. It first took the unusual step of withdrawing the courts' jurisdiction under any other statutes that might apply, including 28 U.S.C. § 1331 (and, subsequently, the Administrative Procedure Act). *See* 42 U.S.C. § 405(h); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). It then guaranteed only that judicial review be available for "final decision[s] . . . made after a hearing." 42 U.S.C. § 405(g); *see also Mathews*, 424 U.S. at 327 ("The only avenue for judicial review is 42 U.S.C. § 405(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite."). The requirement set forth in § 405(g) is critical: "the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are 'final' and 'made after a hearing.'" *Salfi*, 422 U.S. at 764.

Here, the parties approach the statutory text as though the only relevant context consists of "customary usage in administrative law." SG Br. 22; *see also* Petr. Br. 14–15. On that basis, they rely heavily on presumptions and doctrines derived from cases decided under the Administrative Procedure Act (APA). *See* SG Br. 26–29; Petr Br. 14–17. For example, both parties place great weight on the "hallmarks of APA finality." *Sackett v. EPA*, 566 U.S. 120, 126 (2012); *see* SG Br. 27–29; Petr Br. 15–16. And the petitioner repeatedly highlights the "'strong presumption' favoring judicial review of administrative action." Petr. Br. 17 (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015)).

These arguments rest on a faulty premise. The Social Security Act's judicial-review provisions are not properly interpreted as secretly embodying the presumptions of a different and much broader administrative law statute passed years later. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure' the Constitution commands."). To be sure, the APA codified certain "preexisting principles of judicial review of agency action." SG. Br. 28 (citing *I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987)). But "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *see also QinetiQ US Holdings, Inc. & Subsidiaries v. Comm'r of Internal Revenue*, 845 F.3d 555, 560 (4th Cir. 2017) ("Some agency-specific

statutes . . . provide materially different procedures for judicial review that predate the APA's enactment."). Section 405(g) must therefore be interpreted by reference to its agency-specific statutory context, not by reference to general APA doctrines.

The structure of the Social Security Act reflects Congress's effort to "create an orderly, and not unduly vexatious, system for administrative and judicial review of the unimaginable number of decisions of claims for retirement and disability benefits filed under the Act." *Giacone v. Schweiker*, 656 F.2d 1238, 1241 (7th Cir. 1981). This system mandates a scheme of review that is "alien to traditional review of agency action under the Administrative Procedure Act." *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989). The result Congress sought to avoid was a potentially intolerable burden on the federal courts, which in 1939 had merely 179 district judges,[4] if every conceivably determinative procedural decision reached by the agency were judicially reviewable.

Congress responded to this concern in § 405(g) and § 405(h), which required "that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place." *Heckler v. Ringer*, 466 U.S. 602, 627 (1984). Especially given that the inquisitorial social security process boasts powerful protections for claimants, this limitation on review reflected a sensible policy choice: "[C]ases of individual hardship . . . had to be balanced against the potential for overly casual or premature judicial intervention in an administrative

---

[4] *See* Authorized Judgeships, U.S. Courts, https://perma.cc/55EA-5MU7 (last accessed Jan. 31, 2019).

system that processes literally millions of claims every year." *Id.*

Accordingly, § 405(g) cannot be treated as though it were a workaday administrative law requirement. "As provisions for judicial review of agency action go, § 405(g) is somewhat unusual." *Hudson*, 490 U.S. at 885. And that "unusual" character flows from § 405(g)'s central role in preventing the federal courts from being swamped by disputes over the rules of the many-layered administrative process governing the nation's largest social welfare program.[5]

---

[5] The Solicitor General suggests that even if this Court agrees that an Appeals Council dismissal on timeliness grounds is not reviewable in federal court, the court below nonetheless erred by holding that the complaint should be dismissed for lack of jurisdiction. *See* U.S. Br. 24 n.12. Courts, "including this Court," can be "less than meticulous" in their use of the word "jurisdictional," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), and this Court has previously referred to § 405(g)'s exhaustion requirement as both "waivable" and "jurisdictional," in some tension with contemporary usage. *See, e.g.*, *Heckler v. Day*, 467 U.S. 104, 111 n.14 (1984) ("The jurisdictional requirement that administrative remedies be exhausted is waivable."). But this question of usage provides no barrier to affirmance here. The district court granted the agency's motion to dismiss without characterizing the dismissal as jurisdictional. Pet. App. 26a. And although the Sixth Circuit said in passing that "the district court lacked jurisdiction," Pet. App. 5a, nothing in the reasoning or substance of the judgment below was in any way inconsistent with this Court's holding that § 405(g)'s exhaustion requirement is "waivable." *Mathews*, 424 U.S. at 328. The bottom line is that, under a correct interpretation of the statute, Mr. Smith is not entitled to judicial review.

B. A "final decision" is a decision on the merits of a claim for benefits following the exhaustion of agency processes.

The first requirement imposed under § 405(g) is a "final decision" by the Commissioner of Social Security. Relying principally on inapposite APA presumptions, the parties contend that "final decision" encompasses dismissals by the Commissioner for failure to exhaust administrative remedies or comply with prescribed time limitations. That conclusion, they assert, is supported by the dictionary definitions of "final" and "decision." *See* SG Br. 26; Petr Br. 14. On this basis, they contend that Mr. Smith received a "final decision," whether on the timeliness of his petition for Appeals Counsel review, his entitlement to a "good cause" extension of the deadline, or both.

1. That contention is mistaken. As this Court has already emphasized while interpreting § 405(g), finality is a flexible, context-specific, and "intensely practical" concept here: "Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." *Mathews*, 424 U.S. at 331 n.11 (collecting cases); *see also Losh v. Fabian*, 592 F.3d 820, 825–26 (8th Cir. 2010) (recognizing several "reasonable" interpretations of "finality in the context of AEDPA's statute of limitations"); *Herman v. Local 305, Nat'l Post Office Mail Handlers, LIUNA, AFL-CIO*, 214 F.3d 475, 479 (4th Cir. 2000) ("Because there are several plausible meanings for the term 'final decision,' we believe the term is ambiguous."); *Shepherd v. Comm'r*, 147 F.3d 633, 634 (7th Cir. 1998) ("There are

exceptions created by statute, rule, and judicial doctrine to the principle that we can review only final decisions of the district courts. And the very concept of 'finality' is ambiguous."); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Ill. State Bd. of Elections*, 75 F.3d 304, 306 (7th Cir. 1996) (emphasizing the "uncertain meaning of 'final decision' in postjudgment proceedings"); *Sumy v. Schlossberg*, 777 F.2d 921, 923 (4th Cir. 1985) ("It is commonly acknowledged that 'finality' under § 158 or its predecessors must be interpreted in light of the special circumstances of bankruptcy cases."); *Allcare Hospice, Inc. v. Sebelius*, No. 11-Civ-365, 2012 WL 5246512, at *2 (E.D. Okla. Oct. 23, 2012) ("The court finds the phrase 'decision of the Board' is sufficiently ambiguous as to whether it includes the Board's denial of a good cause extension.").[6]

Here, there are several imaginable interpretations of § 405(g). It might, as the parties suggest, refer broadly to any conceivable adverse procedural or merits-based determination reached by the Commissioner that causes a claimant's review process to terminate. That position is supported principally by the absence of an express textual limitation on which "final decision[s]" trigger a right to judicial review. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231 (2007). Or § 405(g)

---

[6] The Solicitor General relies on cases interpreting finality under 28 U.S.C. § 1291, Br. 31–32, but as this Court emphasized while interpreting § 405(g), "certain of the policy considerations implicated in §§ 1257 and 1291 cases are different from those that are relevant here." *Mathews*, 424 U.S. at 331 n.11. The Solicitor General also misses the main point that *Mathews* was making: that context—including "the nature of the claim being asserted and the consequences of deferment of judicial review"—is crucial to interpreting the phrase "final decision" in § 405(g). *Id.*

might perhaps be read as referring to some but not all adverse determinations that cause a claimant's review process to terminate. Finally, as the Solicitor General argued in 1976, the term "final decision" in § 405(g) might "necessarily refer[] to the final disposition of a claim for benefits on its merits" because it incorporates "a requirement of exhaustion of administrative remedies." U.S. Br. 18, *Califano v. Sanders*, No. 75-1443.

2. As nearly every court addressing the issue has concluded, General Bork's interpretation is the most compelling. First consider how this Court has used the phrase "final decision" in Social Security cases while describing the scope of judicial review under § 405(g). In *Bowen v. City of New York*, the Court explained that "[t]o obtain a final decision from the Secretary a claimant is required to exhaust his administrative remedies by proceeding through all three stages of the administrative appeals process. Only a claimant who proceeds through all three stages receives a final decision from the Secretary." 476 U.S. at 482. More recently, in *Sims v. Apfel*, the Court observed that "[i]f a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review in most cases. In administrative-law parlance, such a claimant may not obtain judicial review because he has failed to exhaust administrative remedies." 530 U.S. at 107.

To be sure, as the Solicitor General cautions, neither *Bowen* nor *Sims* squarely addressed the specific question at issue here. *See* SG Br. 34. But it is no coincidence that both cases describe a "final decision" as one that occurs after exhaustion of all administrative remedies—in other words, one that addresses the merits of a claim for benefits after a claimant has successfully

completed "all three stages" of review. *Bowen*, 476 U.S. at 482. Whether understood as proof of ordinary usage, *see Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018), or as evidence of judicial usage, *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 9 (2011), these decisions show that it is natural to read "final decision" in this statute as referring to decisions on the merits after an exhaustion of remedies.

That reading is supported by statutory structure. Section 405 of the Social Security Act does not refer to any extension of the 60-day time limit for seeking review of adverse benefits determinations by ALJs. Because the statute never requires the Commissioner to entertain untimely requests for review, the regulations allowing discretionary good cause extensions reflect nothing more than a policy judgment by the agency to protect claimants beyond statutory mandates. In these circumstances, it makes little sense to read "final decision" in § 405(g) as referring to dismissals on procedural grounds unmentioned in the statute that exist solely by the agency's grace. The more natural reading is that § 405(g) refers to the kinds of "final decisions" required by the statute—which principally consist of decisions on the merits of claims for benefits. Any other reading would undermine § 405(g)'s role in the statutory plan, and create perverse incentives, by inviting a flood of federal cases every time the agency exercises its discretion to create a new exhaustion rule or recognize an exemption from an existing rule. *See Filice*, 319 F.2d at 445–46 (holding that "[t]he orders made judicially reviewable by Subsection (g) of Section 405 are orders authorized by Subsection (b) of Section 405 which make findings of fact and decisions as to rights of applicants for payment, or which affirm, modify, or reverse such orders").

This understanding of the statute is bolstered by *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449 (1999). That case presented the question whether a Medicare provider may obtain judicial review of an intermediary's refusal to reopen a finalized cost report. Applying *Chevron* deference, the Court upheld the agency's position that such a refusal was not the kind of "final determination," 42 U.S.C. § 1395*oo*(a)(1)(A)(i), that triggered a right to review. While analyzing "final determination," the Court emphasized that "the right of a provider to seek reopening exists only by grace of the Secretary," rather than as a matter of statutory right. *Your Home Visiting Nurse Servs.*, 525 U.S. at 454. The Court added that the "statutory purpose of imposing a 180-day limit on the right to seek Board review . . . would be frustrated" by judicial review. *Id.* Both of those considerations apply fully to this case.

Precedent is instructive for still another reason: it confirms that the meaning of "final decision" in § 405(g) is inextricably intertwined with the agency's own exhaustion requirements. This Court could hardly have been clearer on that point in *Salfi*: "[T]he requirement of a 'final decision' contained in § 405(g) is not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332. The term 'final decision' is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation . . . The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." 422 U.S. at 766. One year later, the Court reaffirmed this interpretation in *Mathews*: "[U]nder § 405(g) the power to determine when finality has occurred ordinarily rests with the

Secretary since ultimate responsibility for the integrity of the administrative program is his." 424 U.S. at 330. Then, decades after *Salfi* and *Mathews*, in an opinion by Justice Thomas, the Court again held that "the Act does not define 'final decision,' instead leaving it to the [agency] to give meaning to that term through regulations." *Sims*, 530 U.S. at 106 (citing *Salfi*, 442 U.S. at 766).

3. Following this Court's guidance, many other courts have agreed that the term "final decision" mandates judicial review only of agency decisions on the merits of claims for benefits. As one court put it, "'[F]inal decision,' read in the context of the elaborate scheme for administrative determination of disability claims which precedes it, plainly refers to a decision on the merits." *Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir. 1980); *accord Smith v. Heckler*, 761 F.2d 516, 518 (8th Cir. 1985) (holding that when an "action does not address the merits of the claim," it "cannot be considered appealable"); *Rios v. Sec'y of Health, Ed. & Welfare*, 614 F.2d 25, 26–27 (1st Cir. 1980) ("The 'final decision of the Secretary' refers to the initial substantive decision of the Secretary on the benefits claim.").

In sum, giving "final decision" its plain meaning within the "context of the statute as a whole," *Utility Air*, 573 U.S. at 312, § 405(g) is best read as requiring judicial review of decisions by the agency denying claims for benefits on their merits. That reading underlies the agency's own regulations governing access to judicial review when requests for Appeals Council review are dismissed as untimely. *See* 20 C.F.R. § 416.1472; *id.* § 416.1403. It has also been the government's own position for decades—including as presented to this

Court by numerous Solicitors General. *See, e.g.*, U.S. Br. 16, *Sims v. Apfel*, No. 98-9537 (Solicitor General Waxman); U.S. Br. 20, *Heckler v. City of New York*, No. 84-1923 (Solicitor General Fried); U.S. Br. 18–19, *Califano v. Sanders*, No. 75-1443 (Solicitor General Bork). And this interpretation respects the balance Congress struck in weighing "cases of individual hardship" against the perils of "overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year." *Ringer*, 466 U.S. at 627.

In practice, because the Commissioner is authorized to create (and to waive) exhaustion requirements that ensure "efficient administration," *Salfi*, 422 U.S. at 766, the agency can effectively allow judicial review where § 405(g) does not compel it. That is a standard feature of waivable exhaustion requirements. But it is one thing to recognize that the Commissioner can raise the ceiling on opportunities for judicial review. It is quite another to maintain that § 405(g) creates a floor that mandates access to judicial review for every conceivable determination by the agency that might cause a claimants' proceedings to terminate. That is not what § 405(g) says and it is not what Congress intended.[7]

---

[7] To resist this conclusion, the Solicitor General (at 29-30) relies on § 405(g)'s reference to § 405(a). In relevant part, § 405(g) provides: "[W]here a claim has been denied by the Commissioner . . . because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations." From this, the Solicitor General infers that a court "may review a claimant's compliance with SSA regulations regarding the timeliness of a request for Appeals Council review of an ALJ's decision." SG

C. A final decision "after a hearing" is a decision on a matter on which the Social Security Act requires a hearing.

Even where the Commissioner has rendered a "final decision" within the meaning of § 405(g), judicial review is not authorized unless that decision was made "after a hearing." In this case, there was no hearing on the timeliness of Mr. Smith's request for Appeals Council review, or on whether to grant a discretionary good-cause exception from the 60-day limit. Nor does the Social Security Act require that such a hearing occur. Nevertheless, the parties contend that the "after a hearing" requirement was satisfied because Mr. Smith complied with the agency's chosen procedures for reviewing timeliness and assessing good cause. *See* Petr. Br. 23–24; SG Br. 28, 35–37. In the alternative, they contend that Mr. Smith meets the "after a hearing" requirement because the ALJ held a hearing on his claim

---

Br. 29.

Not so. As the agency's own regulations confirm, this part of § 405(g) addresses cases in which "the Secretary's decision is adverse to a party due to a party's failure to submit proof in conformity with a regulation prescribed under [§ 405(a)] *pertaining to the type of proof a party must offer to establish entitlement to payment.*" 42 C.F.R. § 405.1136 (emphasis added). In that circumstance, "the court will review only whether the proof conforms with the regulation and the validity of the regulation." *Id.* But Mr. Smith's lawsuit concerns neither "entitlement to payment" or, in the language of § 405(g), a "claim [that] has been denied by the Commissioner." Instead, it concerns only the Appeals Council's determination on timeliness and good cause. Those findings do not constitute a denial of his claim for benefits because of his failure to submit proof in conformity with regulations. Indeed, they say nothing about the evidentiary support for his claim for benefits, and address only whether his agency appeal was procedurally proper.

for benefits. *See* Petr. Br. 23; SG Br. 37. These arguments are based on an incorrect interpretation of § 405(g)—indeed, on an interpretation that this Court has *already* considered and rejected.

1. That story begins in 1966, when Judge Friendly was confronted, as a matter of first impression, with a dispute over § 405(g)'s hearing requirement. "On a strictly literal reading," he conceded, "§ 405(g) could be interpreted as applying to any final decision of the Secretary that was handed down after a hearing, albeit a hearing not required by the statute." *Cappadora v. Celebrezze*, 356 F.2d 1, 4 (2d Cir. 1966). But "such an interpretation," he cautioned, "would be unnatural and unsound" in light of the Act "as a whole.'" *Id.* The better reading, he concluded, is that § 405(g)'s "after a hearing" requirement must be interpreted as referring solely to hearings *required by statute*.

Judge Friendly's reasoning began with a simple premise: Congress knew that this agency "would be confronted with a volume of applications probably unparalleled in federal administration." *Id.* Congress also anticipated that "the interests of the agency and the claimant would in most cases coincide," since "the Social Security Administration would be as concerned as the applicant in the payment of a proper claim." *Id.* For these reasons, Congress did not impose the "many requirements of notice and hearing in the usual regulatory statute." *Id.* Instead, the agency "was compelled to hold a hearing in only one instance—where an adverse *ex parte* determination had been made and timely request for a hearing was filed." *Id.* (citing § 405(b)).

"In this context," Judge Friendly explained, statutory text and structure compel a narrower rather than a broader interpretation of § 405(g). *Id.* "The reasonable reading of § 405(g) is that it was intended to apply to a final decision rendered *after a hearing thus made mandatory*, not to a decision which could lawfully have been made without any hearing at all and in that event plainly would not have come under the terms of the section." *Id.* Judge Friendly then added that a more expansive view of "after a hearing" could lead to perverse outcomes: "[T]he broader reading could operate adversely to claimants generally since if a nonmandatory hearing would entail judicial review not otherwise available, this might deter the agency from giving a procedural benefit which the statute does not demand." *Id.* at 5.

2. Following Judge Friendly's influential interpretation of § 405(g) in *Cappadora*, this Court decided *Salfi* and *Mathews*—the cases on which the parties principally rely. *See* Petr. Br. 23–24; SG Br. 35–37. In both cases, the Court allowed judicial review under § 405(g), even though the claimant hadn't exhausted remedies or participated in a hearing on the question at issue. *See Mathews*, 424 U.S. at 331; *Salfi*, 422 U.S. at 767. But in both cases, the Court limited its holdings to cases where a claimant presents colorable constitutional claims. This was confirmed in *Sanders*, where the Court made that restriction explicit and adopted Judge Friendly's analysis as the proper interpretation of "after a hearing."

The claimants in *Salfi* were widows and step-children of deceased wage earners. *See id.* at 753. Their sole contention was that the Act violated the Constitution by prohibiting them from receiving insurance benefits due

to the duration of their relationship to the wage earner. *See id.* Presented with this claim, the Court emphasized that it made little sense to strictly insist on § 405(g)'s requirements, given that the agency lacked jurisdiction to address any constitutional arguments. *See id.* at 765–68. That logic applied equally to the hearing requirement. *See id.* at 767 (explaining that a hearing "would be futile and wasteful" where "the only issue to be resolved is a matter of constitutional law concededly beyond [the Secretary's] competence to decide"). Given that requiring exhaustion and a hearing would be pointless, and that the Secretary had not raised any objections on this ground, the Court held that the claimants "satisf[ied] the requirements of § 405(g)." *Id.*

The same principles controlled in *Mathews*. There, a claimant raised a constitutional due process challenge to the agency's methods for assessing the existence of a continuing disability. *See* 424 U.S. at 323. The Court did not directly address § 405(g)'s "after a hearing" requirement, but instead considered "whether the denial of Eldridge's claim to continued benefits was a sufficiently 'final' decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement." *Id.* at 330. Invoking *Salfi*, the Court held that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment [on exhaustion] is inappropriate." *Id.* *Mathews* presented such a case because "Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement," and because "[a] claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.* at 331. On those bases, the Court deemed § 405(g) satisfied.

3. Here, the Solicitor General reads *Salfi* and *Mathews* as holding that "where SSA has determined that an oral hearing is not necessary to issue a final decision, judicial review of that decision is not barred for lack of a hearing." SG Br. 36. Petitioner agrees. Petr. Br. 23–24.

They are both wrong, as this Court made clear in *Sanders*. There, a claimant sought judicial review of a decision against reopening the disallowance of his claim for benefits. *See* 430 U.S. at 102. Invoking *Cappadora*, the Solicitor General argued that the claimant could not satisfy § 405(g)'s hearing requirement: "Manifestly such a refusal is not 'made after a hearing' within the meaning of the statute. In using that language, Congress evidently intended to reserve judicial review for administrative actions that disposed of claims with respect to which the claimant had been afforded a right to a prior hearing. But there is no entitlement to a hearing on a request to reopen a previously adjudicated claim; determinations of such requests are properly made without a hearing and not 'after a hearing.'" U.S. Br. 17–18, *Sanders*, No. 75-1443 (citing, *inter alia*, *Cappadora*, 356 F.2d at 4).

In response, the claimant in *Sanders*—like the parties here—argued that § 405(g)'s hearing requirement did not block his suit: "In *Weinberger v. Salfi*, 422 U.S. 749 (1975) as well as in *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Court held that the District Court does indeed have jurisdiction to review decisions of the Secretary even though such decisions are not such as were made after a hearing. In each of the foregoing cases the Court held that the requirement of a hearing may be waived." Resp. Br. 11, *Sanders*, No. 75-1443.

Presented with the same argument about *Salfi* and *Mathews* that the parties advance here, this Court squarely rejected it—and instead accepted Solicitor General Bork's interpretation. Citing *Cappadora*, the Court first noted that "a petition to reopen a prior final decision may be denied without a hearing." *Sanders*, 430 U.S. at 108. This fact barred judicial review under § 405(g), the Court elaborated, because "the opportunity to reopen final decisions and any hearing convened to determine the propriety of such action are afforded by the Secretary's regulations and *not by the Social Security Act*." *Id.* (emphasis added). This reasoning obviously rested on the premise—articulated by Judge Friendly and briefed by Solicitor General Bork—that § 405(g) permits review *only* where the Act itself provides for a hearing.

After completing this textual analysis of § 405(g), the Court also cited legislative purpose: "[A]n interpretation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose . . . to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Id.*

Dispelling any doubt about the implications of its holding, *Sanders* then distinguished *Salfi* and *Mathews* on the ground that both cases had excused § 405(g)'s exhaustion and hearing requirements solely on the basis of constitutional avoidance. *See id.* at 109 ("[T]hose cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is

manifested by 'clear and convincing' evidence." (citations omitted)). Absent constitutional concerns, *Sanders* held that § 405(g) applies with full force and permits judicial review only when the Social Security Act itself provides for a hearing on the disputed question. *See id.* at 107–09; *accord Ellis v. Blum*, 643 F.2d 68, 75 n.6 (2d Cir. 1981) (Friendly, J.) ("In response to the [claimant's] argument that *Salfi* and *Eldridge* had dispensed with the requirement of a hearing, the [*Sanders*] Court read those cases as limited to instances in which constitutional issues were raised and a denial of s 405(g) jurisdiction would close 'the federal forum to the adjudication of colorable constitutional claims.'" (citing *Sanders*, 430 U.S. at 109)).

4. Since *Sanders*, courts have widely recognized that § 405(g) limits review to final decisions reached after a hearing required by the Act. As the Second Circuit explained decades ago, *Sanders* "excluded from the scope of [§ 405(g)] all decisions that were not *required* to be preceded by a hearing, whether or not they were in fact preceded by a hearing." *Latona v. Schweiker*, 707 F.2d 79, 81 (2d Cir. 1983); *see also Brandyburg v. Sullivan*, 959 F.2d 555, 560 (5th Cir. 1992); *Peterson*, 631 F.2d at 631; *Sheehan*, 593 F.2d at 325.

Then-Judge Kavanaugh adopted this reading of § 405(g)—and of *Sanders*—in *Stovic.*, 826 F.3d 500. In that case, a retired railroad worker (Stovic) petitioned for review of the Railroad Retirement Board's denial of his request to reopen a prior decision confirming its initial calculation of his benefits. *See id.* at 501–02. The government argued that the court lacked jurisdiction, citing Section 5(f) of the Railroad Unemployment Insurance Act, which limits review to "any final decision of the Board." *Id.* at 502. To support its position, the

government cited § 405(g) of the Social Security Act. But Judge Kavanaugh's opinion for the court rejected this analogy. Section 405(g), he explained, differs from Section 5(f) by virtue of its restriction to final decisions "after a hearing." *Id.* at 503. And in *Sanders*, "after consulting the text of [§ 405(g)]," this Court had "held that denials of requests to reopen were not reviewable" because "the Social Security Act does not *require a hearing* for requests to reopen." *Id.* at 503–04 (emphasis added). Since Section 5(f) lacked a comparable restriction, Judge Kavanaugh added, the government's reliance on § 405(g) was misplaced.

Sanders thus forecloses the parties' argument that Mr. Smith satisfied § 405(g)'s hearing requirement by following the agency's own procedures to seek review of untimely Appeals Council filings. *See* Petr. Br. 23–24; SG Br. 28, 35–37. Because the Social Security Act did not entitle him to a hearing on this point, he cannot invoke § 405(g) to obtain judicial review of the agency's decision.

5. Nor can the petitioner prevail on his passing assertion that § 405(g) was satisfied when he appeared for the original ALJ hearing on his claim for benefits. *See* Petr. Br. 23. Judicial review is confined to a "final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). In context, the sentence plainly refers to a "final decision" reached "after a hearing" *on that decision*. It would be unnatural to read the statute as throwing open the gates to judicial review of any final decision, no matter how collateral, after the ALJ holds an initial hearing on the merits of a claim for benefits. As Judge Friendly made clear, § 405(g) was not meant to apply to "a decision which could lawfully have been made without any hearing at all and in that event

plainly would not have come under the terms of the section." *Cappadora*, 356 F.2d at 4. This structure would be defeated if § 405(g) did, in fact, apply to *many* such final decisions, so long as they were made after an earlier hearing on some entirely unrelated issue.

6. As a last resort, the Solicitor General invokes § 405(h) to argue that "an oral hearing is not always necessary to produce a binding and reviewable agency decision." U.S. Br. 36. Section 405(h) provides that "the findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing." The Solicitor General first points to *Salfi*'s holding that § 405(h)'s preclusion of review outside § 405(g) applies even when a claimant need not exhaust her remedies (or participate in a hearing) because she has raised a constitutional claim. The Solicitor General adds that the Commissioner's regulations permit ALJs to issue decisions with binding effect under § 405(h) even when all relevant parties consent to not holding a hearing. *See* SG Br. 36; 20 C.F.R. § 416.1448(b)(i).

These arguments offer no warrant for departing from the statutory text, or from this Court's holding in *Sanders*. First, *Salfi*'s approval of bypassing exhaustion and hearing requirements was based solely on constitutional avoidance principles, not an interpretation of "after a hearing" in § 405(g) (or § 405(h)). *See Sanders*, 430 U.S. at 108–09. And second, the fact that parties can obtain judicial review following consensual waiver of a statutorily-authorized hearing does not prove that judicial review is permitted in the absence of such statutory authorization.

It therefore follows directly from *Sanders* that Mr. Smith did not receive a "final decision . . . after a hearing" regarding the timeliness of his request for Appeals Council review (or his entitlement to a discretionary good cause exception). Wholly independent from his lack of a "final decision," this failure to satisfy the "after a hearing" requirement requires affirmance.

D. The agency's interpretation of § 405(g) is also supported by longstanding practice in many other contexts.

The interpretation of § 405(g) set forth above is not limited to the context of Social Security claimants insisting upon the timeliness of their administrative appeals or their entitlement to a good-cause extension. On the basis of that interpretation, courts have declined to review many other procedural determinations that may cause a claimant's proceeding to terminate without an award of benefits. As we explain below, unsettling the law would therefore create significant floodgate concerns.

In addition, statutes for other massive benefits programs—including, most notably, Medicare and Medicaid—expressly incorporate § 405(g) into their provisions for judicial review. In cases arising from these statutes, courts have relied upon the interpretation of § 405(g) accepted below but challenged here by the parties. These cases underscore both the reasonableness of the judgment below and the size and complexity of the regulatory apparatuses that a reversal would disrupt.

1. Social Security

There are several additional grounds on which a social security proceeding can terminate that have long

been understood to fall outside § 405(g) for the same reasons set forth above.

a. Dismissal of requests for an ALJ hearing when request is untimely or claimant fails to appear: As the Solicitor General acknowledges, accepting his position would resolve a circuit split on this issue. *See* SG Br. 37. But the split is quite lopsided. Only the Seventh Circuit has expressly held that § 405(g) permits judicial review under these circumstances. *See Boley v. Colvin*, 761 F.3d 803, 805 (7th Cir. 2014). Most other courts have held to the contrary, relying in whole (or in part) on the interpretation of § 405(g) above. *See Doe v. Sec'y of Health & Human Servs.*, 744 F.2d 3, 4 (1st Cir. 1984) ("final decision"); *Penner v. Schweiker*, 701 F.2d 256, 259–60 (3d Cir. 1983) ("after a hearing"); *accord Hilmes v. Sec'y of Health & Human Servs.*, 983 F.2d 67, 70 (6th Cir. 1993); *Brandyburg*, 959 F.2d at 559; *White v. Schweiker*, 725 F.2d 91, 94 (10th Cir. 1984).

b. Denying extension of time to seek judicial review: Every court to have considered the question has held that § 405(g) prohibits judicial review of agency decisions denying requests for an extension of the time to file a civil action in federal court. Many of these decisions rest on the interpretation of "after a hearing" set forth above. *See, e.g.*, *Dozier v. Bowen*, 891 F.2d 769, 771 (10th Cir. 1989); *Turner v. Bowen*, 862 F.2d 708, 709–10 (8th Cir. 1988); *McCall v. Bowen*, 832 F.2d 862, 863 (5th Cir. 1987); *Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir. 1980).

c. Denying extension of time to seek reconsideration: Only one court has addressed this question. Citing *Sanders*, and observing that the Social Security Act "permits such a request to be denied without a hearing,"

the court dismissed under § 405(g). *See Giacone*, 656 F.2d at 1243.

d. Dismissing based on administrative res judicata: This is one of the most common, non-merits-based grounds for dismissal of social security claims. Again, many courts have relied on the analysis set forth above to hold that such dismissals are not reviewable under § 405(g). *See, e.g.*, *Brown v. Sullivan*, 932 F.2d 1243, 1245–46 (8th Cir. 1991); *Rios*, 614 F.2d at 26–27; *accord Nelson v. Sec'y of Health & Human Servs.*, 927 F.2d 1109, 1111 (10th Cir. 1990); *Davis v. Schweiker*, 665 F.2d 934, 935 (9th Cir. 1982); *Hensley v. Califano*, 601 F.2d 216, 216 (5th Cir. 1979) (per curiam)

2. Medicare

a. Dismissal of untimely petitions for administrative review of Medicare Part A and B benefits determinations: In disputes arising under Medicare Part A and Part B, judicial review of the "final decision" by the Secretary of Health and Human Services is authorized "as is provided in [§ 405(g)]." 42 U.S.C. § 1395ff(b)(1)(a). Relying on the interpretation of "final decision" set forth above, many courts have held that when relevant administrative actors within the Medicare system dismiss petitions for review as untimely, those dismissals do not constitute "final decision[s]" authorizing judicial review. *See, e.g.*, *Almy v. Sebelius*, No. 09-Civ-0255, 2014 WL 910197, at *8 (D. Md. Mar. 7, 2014); *A & K Med. Supplies v. Sebelius*, No. 10-Civ-9453, 2012 WL 1556530, at *4 (C.D. Cal. May 1, 2012); *Courtney v. Choplin*, 195 F. Supp. 2d 649, 656 (D.N.J. 2002); *see also Tucker v. Sebelius*, No. 07-Civ-2230, 2010 WL 2761525, at *6 (D.N.J. July 12, 2010); *Tudor on Behalf of Sanders v. Shalala*, 863 F. Supp. 119, 124 (E.D.N.Y. 1994).

b. Dismissal of untimely petitions for administrative review of Medicare Part C benefits and overcharging determinations: Medicare Part C plans allow private insurance companies to contract with the federal government to provide Medicare benefits to enrollees. Under 42 U.S.C. § 1395w-22(g)(5), an enrollee who believes that it did not "receive any health service to which [it] is entitled," or who believes it was overcharged, is entitled to a hearing before HHS to the same extent as provided in § 405(b) (so long as the amount in controversy is $1,000 or more). Such enrollees are also "entitled to judicial review of the Secretary's final decision as provided in [§ 405(g)]." In an unpublished opinion, the Tenth Circuit has concluded that federal courts lack jurisdiction under § 405(g) to review determinations under § 1395w-22(g)(5) where the agency determined that a Medicare Part C beneficiary lacked good cause for failing to appear at an ALJ hearing. *See Estate of Lego v. Leavitt*, 244 F. App'x 227, 231 (10th Cir. 2007). For this conclusion, it relied on the Fifth Circuit's decision in *Brandyburg*, 959 F.2d at 559, which in turn relied on the interpretation of § 405(g) set forth above.

c. Untimely benefits appeals to the Provider Reimbursement Review Board: Much like the Social Security Act, the Medicare Act provides that benefits decisions will be made in the first instance by an agency-designated officer (fiscal intermediaries), with a right of appeal to an agency board (the Provider Reimbursement Review Board). *See* 42 U.S.C. § 1395*oo*(a)(1)(A). Requests for a Board hearing must be filed "within 180 days after notice of the intermediary's final determination." *Id.* § 1395*oo*(a)(3). The Board may extend this time limit "upon a good cause showing." 42 C.F.R. § 405.1836. Judicial review of Board decisions is limited to "any final

decision of the Board." 42 U.S.C. § 1395*oo*(f)(1); *see also* 42 U.S.C. § 1395ii (providing that § 405(h) of the Social Security Act also applies with respect to the Medicare Act).

Most courts to have considered the question have held that when a provider files an untimely petition for review and the Board dismisses it under § 1395*oo*(a)(3), the Board dismissal does not constitute a "final decision" authorizing judicial review under § 1395*oo*(f)(1). *See Saline Cmty. Hosp. Ass'n v. Sec'y of Health & Human Servs.*, 744 F.2d 517, 520 (6th Cir. 1984); *Athens Cmty. Hosp., Inc. v. Schweiker*, 686 F.2d 989, 994 & n.4 (D.C. Cir. 1982); *Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 50 (D.D.C. 2010); *John Muir Mem'l Hosp., Inc. v. Califano*, 457 F. Supp. 848, 853 (N.D. Cal. 1978). Similarly, most courts have held that the denial of a good cause extension of the 180-day deadline is not a "final decision" authorizing judicial review under § 1395*oo*(f)(1). *See Lenox Hill Hosp. v. Shalala*, 131 F. Supp. 2d 136, 141 (D.D.C. 2000) (collecting cases); *see also Miami Gen. Hosp. v. Bowen*, 652 F. Supp. 812, 814 (S.D. Fla. 1986); *Cambridge Hosp. Ass'n v. Bowen*, 629 F. Supp. 612, 615–20 (D. Minn. 1986).

The interpretation of "final decision" underlying these decisions mirrors the interpretation of "final decision" in § 405(g) set forth above. If this Court accepts the parties' arguments here, it may also invite appeals challenging timeliness rulings by the Board.

II. The agency's longstanding interpretation is at a minimum reasonable and therefore entitled to deference.

As explained above, the best reading—based on the text, context, and structure of the statute, this Court's

precedents, and the interpretation of parallel provisions—is that § 405(g) does not confer a right of judicial review where the agency deems a claimant's Appeals Council petition to be untimely (and unworthy of a discretionary good cause extension of the time limit). A dismissal on that ground is neither a "final decision" nor one "made after a hearing" under § 405(g). At a minimum, however, "[t]he SSA's interpretation of [§ 405(g)], adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference." *Astrue*, 566 U.S. at 558.

This Court has repeatedly deferred to the agency in social security cases, citing the "need for agency expertise and administrative experience," "the vast number of claims" at stake, and the length of time that the agency has considered and maintained its positions. *Walton*, 535 U.S. at 225; *see Your Home Visiting Nurse Servs.*, 525 U.S at 453–54 (deferring to agency's interpretation of the term "final determination" as "within the bounds of reasonable interpretation"). Even before *Chevron*, this Court regularly deferred to the agency in light of the "exceptionally broad authority" delegated to it by Congress via the Social Security Act. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *see Batterton v. Francis*, 432 U.S. 416, 426 (1977) ("A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.").

Under this Court's precedents, the agency's reading "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by

the courts." *Entergy*, 556 U.S. at 218; *see also Thomas*, 540 U.S. at 26 ("[W]hen a statute speaks clearly to the issue at hand, we must give effect to the unambiguously expressed intent of Congress, but when the statute is silent or unambiguous, we must defer to a reasonable construction by the agency charged with its implementation."). Accordingly, it is the burden of those who would cast aside a regulation to show that the statute unambiguously compels a contrary reading or the agency's stance is unreasonable.

1. The parties here make virtually no attempt to carry that burden. The Solicitor General makes no mention of *Chevron* deference, does not address any potential ambiguity in § 405(g), and contends only that the agency's long-held interpretation is "inconsistent" with his own newly-adopted interpretation. SG Br. 40–41. For his part, Mr. Smith acknowledges *Chevron* but contends that any ambiguity in § 405(g) should be resolved not by the agency charged with administering it but by the "presumption in favor of judicial review." Petr. Br. 20. Yet given that "judicial review is the exception, not the rule, in these cases," such presumptions have no place here. U.S. Br. 11, in *Sanders*, 75-1443; *see* 42 U.S.C. § 405(h). And there are many respects in which judicial review of social security decisions departs from the administrative law norm. *See Hudson*, 490 U.S. at 885.

Both parties' positions (or lack thereof) on deference are inadequate in light of this Court's repeated recognition that one of the key phrases at issue—"final decision"—is "left undefined by the Act" and delegated to the agency to "flesh out by regulation." *Salfi*, 422 U.S. at 765–66; *see also Sims*, 530 U.S. at 107. The Court has also emphasized that the meaning of "final decision" in

§ 405(g) is context-specific and "intensely practical." *Mathews*, 424 U.S. at 331 n.11. The statute gives the agency "complete authority" to specify its meaning "as [it] deems serve [its] own interests in effective and efficient administration." *Salfi*, 422 U.S. at 765–66. A more prototypical case for deference is hard to imagine.

As for the "after a hearing" requirement, the agency's long-held reading is the one that no less an authority than Judge Friendly pronounced "*the* reasonable reading," while also candidly acknowledging that the statute "could be interpreted as applying to any final decision of the Secretary that was handed down after a hearing." *Cappadora*, 356 F.2d at 4. The agency's "reasonable reading" is also the same one adopted by Solicitor General Bork, this Court in *Sanders*, numerous lower courts, and, most recently, then-Judge Kavanaugh in *Stovic*. The parties would be hard pressed to contend that this same reading of the statute is both unreasonable and unambiguously foreclosed by Social Security Act.

The parties likewise ignore the significance of the agency's unbroken consistency in articulating its reading of the statute. "This Court will normally accord particular deference to an agency interpretation of longstanding duration." *Walton*, 535 U.S. at 220 (deferring to an interpretation of the Social Security Act maintained by the agency for four decades). Here, the relevant regulation has the force of law, was the product of notice-and-comment rulemaking, has been on the books since 1980, has engendered reliance by all but one circuit to consider it, and was preceded by decades of consistent government positions—including briefs filed by multiple Solicitors General in this Court. Given that background, it should make no difference that the Solicitor General

(but not the agency's lawyers) have now decided to switch positions. *See Stutson v. United States*, 516 U.S. 163, 187 (1996) (Stevens, J. concurring) ("[S]urely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage*."). The proper way to change a regulation produced by notice-and-comment rulemaking is through notice-and-comment rulemaking—not an abrupt change of position in this Court.

2. The case for affording deference to the agency's decades-old interpretation of the Social Security Act is bolstered by its understanding of the practical administrative realities of operating what may be the largest administrative claims system in the western hemisphere. Even under the existing restrictive regime, social security claimants filed 19,020 cases in federal district courts in Fiscal Year 2017—by the far the largest category of cases filed each year.[8] (For comparison, 2,021 tort actions, 622 prisoner civil rights cases, and 12,628 prisoner motions to vacate sentences (the second highest category) were filed during the same period.)

The sheer number of claims that could enter the courts as a result of a reversal in this case would pose an institutional cost—both to the agency and to the judiciary. According to the Solicitor General's own estimates, the Social Security Administration processes "more than two million claims . . . each year" and "thousands are dismissed each year for failure to adhere to a regulatory timing requirement." SG Br. 43. And

---

[8] *See United States Courts, Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017*, https://perma.cc/AXE9-YZ34.

these estimates do not even include the dozen other programs that incorporate § 405(g), and that have been interpreted *in pari materia*, which would open the door even wider. In fiscal year 2015, for example, the Department of Health and Human Services and its contractors processed over 213 million Medicare Part A claims and over one billion Medicare Part B claims. *See* HHS, *2016 CMS Statistics Reference Booklet*, at 42.[9] It is precisely to avoid burdening the federal courts with such cases that Congress enacted sections 405(g) and 405(h) in the first place, and then patterned the judicial-review mechanisms for other high-volume claims processes on § 405(g).

As a practical matter, there is not much benefit to be had for claimants in comparison to the costs of permitting judicial review of the Appeals Council's timeliness determinations. The Eleventh Circuit's experience in allowing such claims since *Bloodsworth v. Heckler*, 703 F.2d 1233 (11th Cir. 1983), demonstrates that the cases permitted by the parties' interpretation of § 405(g) are unlikely to raise the kinds of legal questions that require federal judicial involvement. Instead, they are likely to be bound up in simple, specific factual issues (such as whether a letter was mailed by a certain date) or in wholly discretionary agency decisions (such as whether a claimant had good cause to get an extension). *See, e.g.*, *Morris v. Berryhill*, No. 1:15-Civ-495, 2017 WL 600089, at *1 (M.D. Ala. Feb. 14, 2017); *Wright v. Colvin*, No. 3:12-Civ-1007, 2013 WL 5567409, at *5–*7 (M.D. Fla. Oct. 9, 2013); *Maxwell v. Comm'r of Soc. Sec.*, No. 6:12-Civ-5, 2013 WL 298267, at *3 (M.D. Fla. Jan. 25, 2013). These questions are well within the competence of the

[9] https://perma.cc/9L4D-9LZW.

Social Security Administration and are unlikely to benefit materially from an additional layer of review in federal court, as compared to the offsetting judicial and administrative costs of allowing all of these cases to be filed. *See Thomas*, 540 U.S. at 29 ("Perfection in processing millions of such claims annually is impossible.").

This is particularly so in light of the applicable standards of review. As the Solicitor General acknowledges, given these standards, "[i]t should be a rare case in which a claimant can plausibly maintain that SSA's finding of untimeliness is not supported by substantial evidence, or that SSA abused its discretion in refusing to grant a good-cause exception." SG Br. 44. For the rare cases where the agency has manifestly transgressed its regulations, mandamus may be available. *See Your Home Visiting Nurse Servs.*, 525 U.S. at 456 n.3 (reserving this question). In the mine run of social security cases, however, when a claimant is "alleging mere deviation from the applicable regulations in a particular administrative proceeding," the courts have no special competence to add to the "agency's expertise in administering its own regulations." *Bowen*, 476 U.S. at 484–85.

On the other hand (and perhaps counterintuitively), it may well disadvantage claimants if the judgment below is reversed. As Judge Friendly pointed out many years ago, "the broader reading could operate adversely to claimants generally since if a nonmandatory hearing would entail judicial review not otherwise available, this might deter the agency from giving a procedural benefit which the statute does not demand." *Cappadora*, 356 F.2d at 5. Wholly apart from the institutional costs to the affected agencies and courts, it is possible that the

broader rule urged by the parties here would, if adopted, actually hurt more claimants than it would help.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
JOSHUA MATZ
DANIEL WILF-TOWNSEND
Gupta Wessler PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

February 4, 2019

APPENDIX

APPENDIX OF STATUTES INCORPORATING 42 U.S.C. § 405(g)

1. Unemployment compensation for certain former federal employees (5 U.S.C. § 8503(b)) 1

2. Compensation to workers for injury caused by import competition as provided in the Trade Act of 1974 for states with no agreement with the Department of Labor (19 U.S.C. § 2312(b)) 1

3. Claims for benefits for miners and spouses of deceased miners suffering from black lung (30 U.S.C. § 923(b)) 1

4. Disability determinations for old–age, survivors, and disability insurance benefits (42 U.S.C. § 421(d)) 2

5. Special benefits for certain World War II veterans (42 U.S.C. 1009(b)) 2

6. Exclusions of certain individuals and entities from Medicare for misconduct. (42 U.S.C. § 1320a-7(f)(1)) 2

7. Exclusion of representatives and health care providers convicted of violations from participation in social security programs (42 U.S.C. § 1320b-6(e)) 3

8. Review of sanctions and penalties regarding quality and compliance for health care practitioners or other persons regarding (42 U.S.C. § 1320c-5(b)(4)) 3

9. Supplemental security income benefit entitlement (42 U.S.C. § 1383(c)(3)) 4

10. Administrative review of Medicare Part C benefits and overcharging determinations (42 U.S.C. § 1395w-22(g)(5)) 4

11. Eligibility for low-income subsidies for Medicare Part D (42 U.S.C. § 1395w-114(a)(3)(B)(iv)(III)) 5

12. Medicare eligibility for providers of services (42 U.S.C. § 1395cc(h)(1)(A)) 5

13. Medicare Part A and B benefits determinations (42 U.S.C. § 1395ff(b)(1)(A)) 6

14. Administrative review of Medicare services and overcharging determinations for enrollees belonging to HMOs and competitive medical plans (42 U.S.C. § 1395mm(c)(5)(B)) 6

15. Medicare payment eligibility for dialysis facilities (42 U.S.C. § 1395rr(g)(3)) 7

16. Medicaid payment eligibility for intermediate care facilities for the mentally disabled (42 U.S.C. § 1396i(b)(2)) 8

1. **Unemployment compensation for certain former federal employees (5 U.S.C. § 8503(b))**

   5 U.S.C. § 8503(b) provides:

   A Federal employee whose claim for compensation under subsection (a) of this section is denied is entitled to a fair hearing under regulations prescribed by the Secretary. A final determination by the Secretary with respect to entitlement to compensation under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 405(g) of title 42.

2. **Compensation to workers for injury caused by import competition as provided in the Trade Act of 1974 for states with no agreement with the Department of Labor (19 U.S.C. § 2312(b))**

   19 U.S.C. § 2312(b) provides:

   A final determination under subsection (a) of this section with respect to entitlement to program benefits under subpart B of this part is subject to review by the courts in the same manner and to the same extent as is provided by section 405(g) of Title 42.

3. **Claims for benefits for miners and spouses of deceased miners suffering from black lung (30 U.S.C. § 923(b))**

   30 U.S.C. § 923(b) provides:

   (b) . . . The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act.

4. **Disability determinations for old–age, survivors, and disability insurance benefits (42 U.S.C. § 421(d))**

42 U.S.C. § 421(d) provides:

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) shall be entitled to a hearing thereon by the Commissioner of Social Security to the same extent as is provided in section 405(b) of this title with respect to decisions of the Commissioner of Social Security, and to judicial review of the Commissioner's final decision after such hearing as is provided in section 405(g) of this title.

5. **Special benefits for certain World War II veterans (42 U.S.C. 1009(b))**

42 U.S.C. 1009(b) provides:

The final determination of the Commissioner of Social Security after a hearing under subsection (a)(1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner of Social Security's final determinations under section 405 of this title.

6. **Exclusions of certain individuals and entities from Medicare for misconduct. (42 U.S.C. § 1320a-7(f)(1))**

42 U.S.C. § 1320a-7(f)(1) provides:

Subject to paragraph (2), any individual or entity that is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the

same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and section 405(l) of this title, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

7. **Exclusion of representatives and health care providers convicted of violations from participation in social security programs (42 U.S.C. § 1320b-6(e))**

42 U.S.C. § 1320b-6(e)(1) and (2) provide:

(1) Any individual who is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and opportunity for a hearing thereon by the Commissioner to the same extent as is provided in section 405(b) of this title, and to judicial review of the Commissioner's final decision after such hearing as is provided in section 405(g) of this title.

(2) The provisions of section 405(h) of this title shall apply with respect to this section to the same extent as it is applicable with respect to subchapter II.

8. **Review of sanctions and penalties regarding quality and compliance for health care practitioners or other persons regarding (42 U.S.C. § 1320c-5(b)(4))**

42 U.S.C. § 1320c-5(b)(4) provides:

Any practitioner or person furnishing services described in paragraph (1) who is dissatisfied with a determination made by the Secretary under this subsection shall be entitled to reasonable notice and opportunity for

a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

9. Supplemental security income benefit entitlement (42 U.S.C. § 1383(c)(3))

42 U.S.C. § 1383(c)(3) provides:

The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

10. Administrative review of Medicare Part C benefits and overcharging determinations (42 U.S.C. § 1395w-22(g)(5))

42 U.S.C. § 1395w-22(g)(5) provides:

An enrollee with a Medicare+Choice plan of a Medicare+Choice organization under this part who is dissatisfied by reason of the enrollee's failure to receive any health service to which the enrollee believes the enrollee is entitled and at no greater charge than the enrollee believes the enrollee is required to pay is entitled, if the amount in controversy is $100 or more, to a hearing before the Secretary to the same extent as is provided in section 405(b) of this title, and in any such hearing the Secretary shall make the organization a party. If the amount in controversy is $1,000 or more, the individual or organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 405(g) of this title, and both the individual and the organization shall be entitled to be parties to that judicial

review. In applying subsections (b) and (g) of section 405 of this title as provided in this paragraph, and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

11. Eligibility for low-income subsidies for Medicare Part D (42 U.S.C. § 1395w-114(a)(3)(B)(iv)(III))

42 U.S.C. § 1395w-114(a)(3)(B)(iv)(III) provides:

[J]udicial review of the final decision of the Commissioner made after a hearing shall be available to the same extent, and with the same limitations, as provided in subsections (g) and (h) of section 405 of this title.

12. Medicare eligibility for providers of services (42 U.S.C. § 1395cc(h)(1)(A))

42 U.S.C. § 1395cc(h)(1)(A) provides:

Except as provided in paragraph (2), an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a

reference to the Secretary or the Department of Health and Human Services, respectively.

13. Medicare Part A and B benefits determinations (42 U.S.C. § 1395ff(b)(1)(A))

42 U.S.C. § 1395ff(b)(1)(A) provides:

Subject to subparagraph (D), any individual dissatisfied with any initial determination under subsection (a)(1) of this section shall be entitled to reconsideration of the determination, and, subject to subparagraphs (D) and (E), a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and, subject to paragraph (2), to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. For purposes of the preceding sentence, any reference to the "Commissioner of Social Security" or the "Social Security Administration" in subsection (g) or (l) of section 405 of this title shall be considered a reference to the "Secretary" or the "Department of Health and Human Services", respectively.

14. Administrative review of Medicare services and overcharging determinations for enrollees belonging to HMOs and competitive medical plans (42 U.S.C. § 1395mm(c)(5)(B))

42 U.S.C. § 1395mm(c)(5)(B) provides:

A member enrolled with an eligible organization under this section who is dissatisfied by reason of his failure to receive any health service to which he believes he is entitled and at no greater charge than he believes he is required to pay is entitled, if the amount in controversy is $100 or more, to a hearing before the Secretary to the same extent as is provided in section 405(b) of this title,

and in any such hearing the Secretary shall make the eligible organization a party. If the amount in controversy is $1,000 or more, the individual or eligible organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 405(g) of this title, and both the individual and the eligible organization shall be entitled to be parties to that judicial review. In applying sections 405(b) and 405(g) of this title as provided in this subparagraph, and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

15. Medicare payment eligibility for dialysis facilities (42 U.S.C. § 1395rr(g)(3))

42 U.S.C. § 1395rr(g)(3) provides:

A facility dissatisfied with a determination by the Secretary under paragraph (1) shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

16. Medicaid payment eligibility for intermediate care facilities for the mentally disabled (42 U.S.C. § 1396i(b)(2))

42 U.S.C. § 1396i(b)(2) provides:

> Any intermediate care facility for the mentally retarded which is dissatisfied with a determination by the Secretary that it no longer qualifies as a[n] intermediate care facility for the mentally retarded for purposes of this subchapter, shall be entitled to a hearing by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

No. 17-1606

In The Supreme Court of the United States

RICKY LEE SMITH,

Petitioner,

v.

NANCY A. BERRYHILL,
Acting Commissioner, Social Security Administration,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES IN SUPPORT OF THE PETITIONER

CAROLYN A. KUBITSCHEK
Counsel of Record
LANSNER & KUBITSCHEK
325 Broadway, Suite 203
New York, NY 10007
(212) 349-0900
ckubitschek@lanskub.com

PAUL B. EAGLIN
P. O. Box 6033
Syracuse, NY 13217
(877) 374-4744
peaglin@eaglinlaw.com

CODY T. MARVIN
LAW OFFICES OF
BARRY A. SCHULTZ, P.C.
1601 Sherman Ave.,
Suite 500
Evanston, IL 60201
(847) 316-1282
cody@barryschultz.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. The disability claims process is long, complicated, and can be confusing to claimants	3
II. Prior decisions of this court resolve the issue of jurisdiction	14
III. The Appeals Council's wrongful dismissals cause harm to claimants	17
A. The stage at which a claim is dismissed arbitrarily determines whether the claimant may obtain review of the dismissal	19
B. Appeals Council dismissals entail less rigorous review than other types of Appeals Council dispositions	20
C. The Appeals Council has an enormous workload, resulting in hasty and erroneous decisions	21
D. Appeals Council denials on the merits are often erroneous, resulting in frequent federal court reversals	23
IV. Allowing review of Appeals Council dismissals will cause only a slight increase in federal court filings	26
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Aguiniga v. Colvin, 833 F.3d 896 (8th Cir. 2016) 29

Barnes v. Astrue, No. 08-2294, 2010 WL 1416884 (C.D. Ill., Apr. 1, 2010) 20

Barnhart v. Thomas, 540 U.S. 20 (2003) 5

Barrett v. Berryhill, 906 F.3d 340 (5th Cir. 2018) 26

Bastien v. Califano, 572 F.2d 908 (2d Cir. 1978) 7

Biestek v. Berryhill, No. 17-1184 (sub judice) 6

Bloodsworth v. Heckler, 703 F.2d 1233 (11th Cir. 1983) 2

Bowen v. City of New York, 476 U.S. 467 (1986) 1, 3, 12, 16

Draper v. Sullivan, 899 F.2d 1127 (11th Cir. 1990) 29

Dugan v. Sullivan, 957 F.2d 1384 (7th Cir. 1992) 29

Hart v. U.S. Com'r Social Sec. Admin., Civ. No. 09-cv-1401, 2011 WL 1211548 (W.D. La., Mar. 10, 2011) 18

Heckler v. Campbell, 461 U.S. 458 (1983) 6

Hopgood ex rel. L.G. v. Astrue, 578 F.3d 696 (7th Cir. 2009) 25

Howard v. Apfel, No. 97-0812-CV-W-BC-SSA, 17 F.Supp.2d 955 (W.D. Mo. 1998) 20

Jones v. Astrue, 526 F.Supp.2d 455 (S.D.N.Y. 2007) 17, 18

TABLE OF AUTHORITIES – Continued

Page

Jones v. Astrue, No. 09 Civ. 5577 (DAB) (FM), 2011 WL 3423771 (S.D.N.Y., Jul. 15, 2011) 18

Lively v. Secretary of Health and Human Services, 820 F.2d 1391 (4th Cir. 1987) 29

Mathews v. Eldridge, 424 U.S. 319 (1976) 1, 15, 16

Matsibekker v. Heckler, 738 F.2d 79 (2d Cir. 1984) 13

Nguyen v. Colvin, No. 16-cv-1535-JAH-AGS, 2018 WL 1510460 (S.D. Cal., Mar. 27, 2018) 13

Oberg v. Astrue, 472 Fed. Appx. 488 (9th Cir. 2012) 29

Quarles v. Colvin, No. 15-00572-N, 2016 WL 4250399 (S.D. Ala., Aug. 10, 2016) 28

Richards v. Apfel, No. C-98-4132-CAL, 1999 WL 252477 (N.D. Cal., Apr. 14, 1999) 20

Ritchie v. Apfel, No. 98-226-B, 1999 WL 1995198 (D. Me., Mar. 11, 1999) 13

Sims v. Apfel, 530 U.S. 103 (2000) 5

Sullivan v. Zebley, 593 U.S. 521 (1990) 4

Vargas v. Colvin, No. 14-20133-CR, 2014 WL 6384150 (S.D. Fla., Oct. 28, 2014), report and recommendation adopted, 2014 WL 6455366 (S.D. Fla., Nov. 13, 2014) 28

Walker v. Commissioner of Social Sec., 2013 WL 3833199 No. 6:12-cv-1025-Orl-DAB (M.D. Fla., Jul. 23, 2013) 28

TABLE OF AUTHORITIES – Continued

Page

Wallschlaeger v. Schweiker, 705 F.2d 191 (7th Cir. 1983) 4

Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 3

Weinberger v. Salfi, 422 U.S. 749 (1975) 1, 14, 15, 16

Yenik v. Commissioner of Social Sec., 522 Fed. Appx. 65 (2d Cir. 2013) 8

STATUTES

28 U.S.C. § 1361 18

42 U.S.C. § 405(b)(1) 6

42 U.S.C. § 405(g) ..... *passim*

42 U.S.C. § 423(a)(1) 3

42 U.S.C. § 423(b) 7

42 U.S.C. § 423(d)(2)(A) 4

42 U.S.C. § 1382(a) 3

42 U.S.C. § 1382c(a)(3)(B) 4

42 U.S.C. § 1383(c)(3) 9

RULES

5 C.F.R. § 930.204(b) 7

20 C.F.R. § 404.620(a) 7

20 C.F.R. § 404.621(a)(1) 29

TABLE OF AUTHORITIES – Continued

Page

20 C.F.R. § 404.900(b) 5
20 C.F.R. § 404.901 11
20 C.F.R. § 404.909(a) 5
20 C.F.R. § 404.909(a)(1) 10
20 C.F.R. § 404.914 5
20 C.F.R. § 404.922 5
20 C.F.R. § 404.933(b)(1) 10
20 C.F.R. § 404.950 6
20 C.F.R. § 404.950(a) 7
20 C.F.R. § 404.950(b) 7
20 C.F.R. § 404.953(a) 7
20 C.F.R. § 404.957(c)(1) 29
20 C.F.R. § 404.960(a) 19
20 C.F.R. § 404.967 ..... 9, 20
20 C.F.R. § 404.968(a)(1) 10
20 C.F.R. § 404.970(a) 25
20 C.F.R. § 404.972 19
20 C.F.R. § 404.1505(a) 4
20 C.F.R. § 404.1520 5
20 C.F.R. § 404.1560(c) 6
20 C.F.R. § 404.1566(e) 6
20 C.F.R. § 416.310 4
20 C.F.R. § 416.330(a) 7

TABLE OF AUTHORITIES – Continued

Page

20 C.F.R. § 416.905(a) 4
20 C.F.R. § 416.920 6
20 C.F.R. § 416.960(c) 6
20 C.F.R. § 416.966(e) 6
20 C.F.R. § 416.1400(b) 5
20 C.F.R. § 416.1401 11
20 C.F.R. § 416.1409(a) 5, 10
20 C.F.R. § 416.1414 5
20 C.F.R. § 416.1422 5
20 C.F.R. § 416.1433(b) 10
20 C.F.R. § 416.1450 6
20 C.F.R. § 416.1450(a) 7
20 C.F.R. § 416.1450(b) 7
20 C.F.R. § 416.1453(a) 7
20 C.F.R. § 416.1460(a) 19
20 C.F.R. § 416.1467 ..... 9, 20
20 C.F.R. § 416.1468(a) 10
20 C.F.R. § 416.1470(a) 25
20 C.F.R. § 416.1472 19
20 C.F.R. § 422.205(b) 21
20 C.F.R. § 422.205(c) 21
20 C.F.R. § 422.210(c) 11
20 C.F.R. § 422.505 4

TABLE OF AUTHORITIES – Continued

Page

20 C.F.R. Part 404, Subpart P, Appendix 2 6

Fed. R. Evid. 802 6

OTHER AUTHORITIES

Administrative Conference of the United States, *Improving Consistency in Social Security Disability Adjudications*, https://www.acus.gov/recommendation/improving-consistency-social-security-disability-adjudications#_ftnref18 25

Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199 (1990) 22

HALLEX I-2-4-40(J) 29

Office of the Inspector General, *Request for Review Workloads at the Appeals Council*, Report Number A-12-13-13039, March 7, 2014 .....21, 22

POMS DI 27001.001(B)(4) 5

POMS GN 03101.010(A)(1) 11

Soc. Sec. Admin., *Annual Data for Average Processing Time of Appeals Council Requests for Review*, https://www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html 12

Soc. Sec. Admin., *Appeals Council Request for Review*, https://secure.ssa.gov/iApplNMD/oao 23

TABLE OF AUTHORITIES – Continued

Page

Soc. Sec. Admin., *Appeals to Court as a Percentage of Appealable AC Dispositions*, https://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html 26

Soc. Sec. Admin., *Appointed Representative Guide to Requesting Appeals Council Review*, https://www.ssa.gov/appeals/reps/Appt_Rep_Guide_Req_AC_Review_Submit_Evidence.pdf 8

Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council*, https://www.ssa.gov/appeals/about_ac.html 10, 22

Soc. Sec. Admin., *Court Remands as a Percentage of New Court Cases Filed*, https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html 24

Soc. Sec. Admin., *Fiscal Year 2017 Congressional Justification*, https://www.ssa.gov/budget/FY17Files/2017FCJ.pdf 24

Soc. Sec. Admin., *Fiscal Year 2018 Congressional Justification*, https://www.ssa.gov/budget/FY18Files/2018JEAC.pdf 9, 24

Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, https://www.ssa.gov/budget/Files/2019CJ.pdf 11, 24, 28

Soc. Sec. Admin., *Hearing Office Average Processing Time Ranking Report FY 2019*, https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html 12

TABLE OF AUTHORITIES – Continued

Page

Soc. Sec. Admin., *What is FICA?*, https://www.ssa.gov/thirdparty/materials/pdfs/educators/What-is-FICA-Infographic-EN-05-10297.pdf.....3

U.S. District Courts, *Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017*, http://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2017.pdf.....26

United States Courts, *Federal Judicial Caseload Statistics 2018*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018.....27

INTEREST OF AMICUS CURIAE[1]

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a national membership organization comprising approximately 2,900 individuals, mostly attorneys, who represent individuals applying and appealing claims for Social Security and Supplemental Security Income (SSI) benefits. NOSSCR members include employees of legal services organizations, educational institutions, and other nonprofits; employees of for-profit law firms and other businesses; and individuals in private practice.

SUMMARY OF THE ARGUMENT

The Social Security Administration's policy disallowing judicial review of Appeals Council dismissals is unfair, harmful to claimants, and contrary to this Court's precedent.

Prior decisions by this Court establish that exhaustion of administrative remedies is not required for jurisdiction of the federal courts. In *Bowen v. City of New York*, 476 U.S. 467 (1986), *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975), this Court recognized the rights of

[1] Under Supreme Court Rule 37.6, NOSSCR states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than NOSSCR and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Petitioner, Respondent, and Appointed Amicus have consented to NOSSCR filing an amicus brief.

claimants to seek judicial review despite failure to exhaust administrative remedies. The Eleventh Circuit's decision in *Bloodsworth v. Heckler*, 703 F.2d 1233, 1239 (11th Cir. 1983) is consistent with this Court's precedent.

The Social Security Administration makes errors in reviewing claims, and its policy deprives claimants of an opportunity to correct those errors. Claimants who cannot seek judicial review of Appeals Council dismissals lose any opportunity to collect benefits to which they may be entitled. Several factors suggest that some Appeals Council dismissals are incorrect and should be reversed. The Appeals Council is understaffed and overwhelmed, and therefore prone to error. The Appeals Council devotes fewer resources to dismissals than other dispositions, as they require review of only a single adjudicator, while other dispositions require the review of two or three adjudicators. There is a high rate of error in Appeals Council determinations, as half of the cases denied by the Appeals Council on the merits which are appealed to federal court are reversed.

The Social Security Administration acknowledges the possibility of error in the dismissal of claims, as it permits review to claimants whose cases are dismissed at earlier stages of the application process. However, the Administration precludes review of dismissals at the Appeals Council stage, without explaining why it does not permit correction of errors by the Appeals Council. Cases from within the Eleventh Circuit, and more recently the Seventh Circuit, demonstrate that

the Appeals Council does in fact make errors, and judicial review is necessary to correct those errors. Claimants who do not live within the Seventh or Eleventh Circuits are foreclosed from seeking review of erroneous Appeals Council dismissals. Permitting judicial review of Appeals Council denials would result in a miniscule increase in the federal court caseload, but would prevent a significant loss of benefits to claimants.

ARGUMENT

I. The disability claims process is long, complicated, and can be confusing to claimants.

The federal disability program is comprised of two programs. The first, Social Security Disability Insurance Benefits (SSDIB), are paid to disabled persons who have contributed to the Disability Insurance Program through FICA[2] withholding, and to their dependents. 42 U.S.C. § 423(a)(1); *City of New York*, 476 U.S. at 470. The amount of the monthly benefit is based upon the amount the individual has paid into the program through FICA withholding. The second, Supplemental Security Income (SSI), is paid to financially needy disabled persons, including children, whose income and assets fall below specified levels. 42 U.S.C. § 1382(a); *Washington State Dept. of Social and Health*

[2] FICA, the Federal Insurance Contributions Act, is a payroll tax. Soc. Sec. Admin., *What is FICA?*, https://www.ssa.gov/thirdparty/materials/pdfs/educators/What-is-FICA-Infographic-EN-05-10297.pdf.

Services v. Guardianship Estate of Keffeler, 537 U.S. 371, 375 (2003). The amount of the monthly benefit is set by federal law, although each State has an option of supplementing the federal benefit amount, and many States do so.

The definition of disability is virtually the same for both programs:[3] the inability to do one's former job or any other job which exists in significant numbers in the national economy, considering the applicant's age, education, and past work experience. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); 20 C.F.R. §§ 404.1505(a), 416.905(a).[4]

For both the SSDIB and SSI programs, the lengthy and complex application process is identical. Indeed, the process is so complicated that it has been called a "byzantine labyrinth." *Wallschlaeger v. Schweiker*, 705 F.2d 191, 194 (7th Cir. 1983).

First, the individual must file a written or electronic application and provide medical documents or medical releases to supply proof of her disability.[5] 20 C.F.R. §§ 416.310, 422.505. If her application is denied, the Social Security Administration will provide her with a written notice of denial. She then must submit a written request for reconsideration, along with any

---

[3] The one exception – the definition of disability for disabled indigent children in the SSI program – is not relevant to this case. *Sullivan v. Zebley*, 493 U.S. 521 (1990).

[4] All citations are to the April 1, 2018 20 C.F.R.

[5] The Social Security Administration does not accept oral requests at any stage of the process.

additional information she possesses regarding her inability to work. 20 C.F.R. §§ 404.909(a), 416.1409(a). The request for reconsideration form may be completed and submitted online. Social Security Administration Program Operations Manual System (POMS) DI 27001.001(B)(4).

The Social Security Administration will provide a written determination of the reconsideration request. 20 C.F.R. §§ 404.922, 416.1422. If the determination is unfavorable, the applicant has the right to request, in writing, a hearing before an Administrative Law Judge.[6]

A Social Security hearing is inquisitorial, not adversarial. 20 C.F.R. §§ 404.900(b), 416.1400(b); *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000). At the hearing, which is recorded, the applicant has the burden of proving that she suffers from mental or physical impairments which make it impossible for her to perform any of her "past relevant work."[7] 20 C.F.R. §§ 404.1520,

---

[6] The Social Security Administration regularly reviews the cases of disability benefits recipients in order to determine whether they are still disabled. If, during one of those reviews, the Social Security Administration decides that a recipient is no longer disabled, the agency will send a written notice of termination of benefits to the recipient. The recipient has a right to challenge that determination through the same administrative process described for applicants. This process begins at the reconsideration hearing stage. 20 C.F.R. §§ 404.914, 416.1414.

[7] "Past relevant work" is work that the applicant did during the 15 years before the hearing date. The fact that one or more of the applicant's past jobs has become obsolete and may no longer exist is legally irrelevant. *Barnhart v. Thomas*, 540 U.S. 20 (2003).

416.920. She may give sworn testimony, may be represented by counsel or a non-attorney representative if she chooses, may bring witnesses to testify on her behalf, and may cross-examine witnesses whom the Social Security Administration has called to give evidence. 20 C.F.R. §§ 404.950, 416.1450. As the Federal Rules of Evidence do not apply in administrative hearings, 42 U.S.C. § 405(b)(1), the applicant has the right to submit written evidence without concern for the rule against hearsay. Fed. R. Evid. 802. Therefore, most, if not all, of the medical evidence at the hearing – medical records, prescription records, laboratory test results, reports from physicians – is in written form.

If the applicant shows that she cannot perform any of her past work, the burden shifts to the Social Security Administration to show that other jobs exist which she can perform. 20 C.F.R. §§ 404.1560(c), 416.960(c). The Social Security Administration may be able to satisfy that burden by relying on its own Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2, known as the "Grids."[8] If the applicant's individual characteristics do not match any of the Grid categories, the Administrative Law Judge may obtain the testimony of a vocational expert.[9] 20 C.F.R. §§ 404.1566(e), 416.966(e). The applicant has the option of cross-examining the vocational expert or providing testimony from her own expert.

---

[8] *See Heckler v. Campbell*, 461 U.S. 458 (1983).

[9] *See also Biestek v. Berryhill*, No. 17-1184, which is sub judice in this Court.

If the applicant testifies at the administrative hearing, and most applicants do testify,[10] the Administrative Law Judge has the option of questioning her, and most Administrative Law Judges exercise that option. Since all Administrative Law Judges are lawyers, 5 C.F.R. § 930.204(b), and many have trial experience, the questioning can get intense. Applicants sometimes exit their hearings feeling that they have been the targets of an inquisition.

After the hearing, the Administrative Law Judge issues a written decision, which the Social Security Administration mails to the applicant. If the applicant was represented at the hearing, the Social Security Administration will mail a copy of the decision to the applicant's attorney or other representative. 20 C.F.R. §§ 404.953(a), 416.1453(a). The Social Security Administration does not send its decisions electronically.

The Administrative Law Judge must decide whether the applicant was disabled at any time from the date upon which she said that the disability began up to and including the date of the administrative hearing. 42 U.S.C. § 423(b); *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978); 20 C.F.R. §§ 404.620(a); 416.330(a). If the Administrative Law Judge's decision is unfavorable to the applicant, she has a fourth, and final, step in the administrative labyrinth – she can file a written

---

[10] She can waive her own testimony and rely on the testimony of others. 20 C.F.R. §§ 404.950(a), 416.1450(a). She can even waive the entire hearing and ask that the Administrative Law Judge decide her case upon the written record alone. 20 C.F.R. §§ 404.950(b), 416.1450(b).

request for the Social Security Appeals Council to review the Administrative Law Judge's decision. The Social Security Administration's "preferred method" for requesting Appeals Council review of an Administrative Law Judge's decision or dismissal is "via the internet."[11] That method (which was not available in 2014, when Ricky Smith's case was pending) strongly reduces the possibility that the Appeals Council will lose the paper Request for Review document or misfile it in the wrong claimant's folder, thereby reducing the likelihood that the Appeals Council will mistakenly dismiss timely-filed Requests for Review.[12]

The Social Security Administration will assign one or more Administrative Appeals Judges to review the records in the applicant's file, listen to the audiotape of the administrative hearing, and consider whatever additional evidence the applicant has submitted and whatever legal arguments the applicant or her lawyer have made in support of her case. Then the Appeals Council will issue a disposition. The Appeals Council issues four types of dispositions: decisions (which can be fully favorable, partially favorable,

---

[11] Soc. Sec. Admin., *Appointed Representative Guide to Requesting Appeals Council Review*, https://www.ssa.gov/appeals/reps/Appt_Rep_Guide_Req_AC_Review_Submit_Evidence.pdf.

[12] With any system that involves large amounts of paper, requiring filing in the proper folder, human error is not uncommon. For example, in *Yenik v. Commissioner of Social Sec.*, 522 Fed. Appx. 65, 65-66 (2d Cir. 2013), a Social Security case proceeded all the way to the United States Court of Appeals before it was noticed that the Social Security file contained medical records belonging to someone other than the claimant.

or unfavorable), remands to an Administrative Law Judge, denials of requests for review, and dismissals of requests for review. 20 C.F.R. §§ 404.967, 416.1467.

If the Appeals Council decision is not favorable to the applicant, she can file a civil action in the United States District Court, seeking judicial review of the decision. 42 U.S.C. §§ 405(g), 1383(c)(3).

Needless to say, the lengthy and sometimes confusing application process is a daunting task for applicants, who all suffer from some kind of health issues, and many of whom are poorly educated and impecunious. Therefore, at each stage of the administrative process, many non-prevailing applicants simply drop their claims, and do not move to the next step of the process. For example, in Fiscal Year 2016, 2,582,092 individuals applied for SSDIB or SSI benefits.[13] 852,090 (33%) were awarded benefits while 1,730,002 (67%) were denied. *Id.* Of those whose applications the Social Security Administration denied, only 633,474 (37%) sought reconsideration. *Id.*

At the reconsideration stage, the Social Security Administration awarded benefits to 76,017 applicants (12%), while denying benefits to 557,457 applicants (88%). *Id.*

---

[13] Soc. Sec. Admin., *Fiscal Year 2018 Congressional Justification*, https://www.ssa.gov/budget/FY18Files/2018JEAC.pdf. Some applicants file concurrently for SSI and SSDIB benefits. Individuals whose claims are filed under both programs are counted as a single claim.

At their administrative hearings, 219,022 (46%) of the applicants were awarded benefits, while a total of 261,874 were either denied or dismissed: 166,647 (35%) were denied, and another 95,227 (20%) were dismissed. *Id.* Again, there was attrition: only 133,840 applicants appealed to the Appeals Council. *Id.*

The Appeals Council ruled in favor of claimants or remanded to an Administrative Law Judge for new hearings in 17,399 (13%) of the cases. It dismissed 5,353 (4%) of the cases on procedural grounds, not the merits. *Id.* In Fiscal Year 2017, the 57 Administrative Appeals Judges, assisted by 46 Appeals Officers, and several hundred support personnel,[14] ruled on more than 160,000 cases.[15]

At every stage of the administrative process, the applicant (or recipient challenging the termination of her benefits) must comply with short time deadlines which are strictly enforced. She must submit the appropriate request for review within 60 days of receiving the written decision that she is challenging.[16] The

---

[14] Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council*, https://www.ssa.gov/appeals/about_ac.html.

[15] *Id.*

[16] Thus, she must submit a written request for reconsideration within 60 days of receiving the notice that her application has been denied. 20 C.F.R. §§ 404.909(a)(1), 416.1409(a). She must file a request for an administrative hearing within 60 days of receiving the notice that her request for reconsideration has been denied. 20 C.F.R. §§ 404.933(b)(1), 416.1433(b). She must file a request for Appeals Council review within 60 days of receiving the Administrative Law Judge's decision. 20 C.F.R. §§ 404.968(a)(1), 416.1468(a).

Social Security Administration presumes that the notice to the applicant has been mailed on the day that it was signed, 20 C.F.R. § 422.210(c); POMS GN 03101.010(A)(1), and that the mail was delivered within five days of mailing. 20 C.F.R. §§ 404.901, 416.1401. Thus, if the applicant does not file the appropriate request within 65 days of the date on the document from which she seeks review, the Social Security Administration will dismiss her case as untimely. The dismissal of an applicant's request for Appeals Council review of an unfavorable Administrative Law Judge decision is the subject of the instant case.

By contrast, the regulations impose no such time limits on the Social Security Administration itself. At each of the four stages of the administrative process, the agency may take as much time as it pleases to make a determination or decision on the applicant's case. Enormous delays are common. It can take years for an applicant to complete the process from the date that she applies until the date that the Appeals Council denies her case. The average processing time in Fiscal Year 2017 was 111 days for an initial determination, 101 additional days for a reconsideration determination, and 605 additional days for a decision from an Administrative Law Judge at the hearing level.[17] There is a large variation in wait times at the hearing level of the administrative process, depending upon where the claimant lives – claimants in

---

[17] Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, p. 13 (This figure comes from adding processing times for initial, reconsideration, and hearing decisions).

Providence, Rhode Island wait 265 days, on average, to receive decisions on their cases, while claimants in San Juan, Puerto Rico must wait an average of 867 days for their decisions.[18] The average processing time from the filing of a request for review and the date of the Appeals Council's disposition in Fiscal Year 2016 was 364 days.[19] A typical Social Security claim thus takes over three years from the date of filing to the date of a decision at the final stage of administrative review, while an unlucky claimant in Puerto Rico must wait an average of nearly four years for a determination from the Appeals Council. The applicant or recipient has no alternative but to wait for the agency to act.

If the applicant waits more than 65 days to file a civil action in the United States District Court after a decision from the Appeals Council which has upheld the denial of her application or which has denied review and adopted the decision of the Administrative Law Judge as the final decision of the Commissioner, the law is clear that the applicant has, at most, missed a statute of limitations, i.e., the applicant's failure to file timely has not deprived the court of jurisdiction. *City of New York*, 476 U.S. at 478. And the defense of statute of limitations can be waived, when appropriate, by the Commissioner of Social Security or by the court.

---

[18] Soc. Sec. Admin., *Hearing Office Average Processing Time Ranking Report FY 2019*, https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html.

[19] Soc. Sec. Admin., *Annual Data for Average Processing Time of Appeals Council Requests for Review*, https://www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html.

Federal courts, in considering such defenses, have regularly found that the Commissioner was wrong, and that applicants have in fact filed their cases within the 60-day statute of limitations. In *Matsibekker v. Heckler*, 738 F.2d 79 (2d Cir. 1984), the court ruled that a claimant had timely filed his civil action where he had filed within 60 days of actually receiving the Appeals Council denial notice, even though his filing (due to delay in the delivery of the mail) was more than 90 days after the date on the notice itself.

In *Nguyen v. Colvin*, No. 16-cv-1535-JAH-AGS, 2018 WL 1510460 at *3 (S.D. Cal., Mar. 27, 2018), the Commissioner alleged that the claimant had filed late, i.e., more than 65 days after the April 12, 2016, date on the Appeals Council denial notice. However, because the envelope containing the denial notice was postmarked April 26, 2016, the Court concluded that the filing on June 18, 2016 was timely. *Id.* In *Ritchie v. Apfel*, No. 98-226-B, 1999 WL 1995198 at *2 (D. Me., Mar. 11, 1999), the Commissioner moved to dismiss an action as untimely, despite unrebutted evidence that, although the claimant had informed the Social Security Administration of his change of address from New Mexico to Maine, the Appeals Council nonetheless sent the notice to the previous New Mexico address. The court denied the motion to dismiss.

II. Prior decisions of this court resolve the issue of jurisdiction.

This Court has concluded that federal courts have jurisdiction to hear a Social Security case, despite a claimant's failure to exhaust all administrative remedies, i.e., to obtain a final decision on the merits of her claim from the Appeals Council.[20] Indeed, this Court has done so repeatedly.

In *Salfi*, 422 U.S. 749, this Court first considered the question of whether the federal courts have jurisdiction, under 42 U.S.C. § 405(g), to hear cases filed by Social Security claimants whose applications for benefits have been rejected at both the initial and reconsideration stages of the administrative process, but who have not sought either administrative hearings or Appeals Council review of the decisions. *Id.* at 753-54. This Court ruled explicitly that the federal courts possess jurisdiction, under 42 U.S.C. § 405(g), to consider the individuals' claims that the Social Security Administration (which was then a branch of the United States Department of Health and Human Services) had wrongfully deprived them of Social Security benefits by applying an unconstitutional statute, notwithstanding the claimants' failure to complete all four stages of the administrative process.

This Court, examining its jurisdiction *sua sponte*, rejected the contention that 42 U.S.C. § 405(g) requires

---

[20] A final decision on the merits includes a denial of the claimant's request for review of a decision by an Administrative Law Judge. *See* pp. 8-9, *supra*.

a final decision from the Appeals Council on the merits of a claim as a prerequisite to a federal court's exercise of jurisdiction. This Court also rejected the contention that the jurisdictional requirement of a "final decision . . . made after a hearing," 42 U.S.C. § 405(g), was limited to decisions of Administrative Law Judges, issued after full, trial-type administrative hearings. Instead, this Court concluded that, "for purposes of this litigation the reconsideration determination is 'final.'" *Id.* at 767.

However, this Court found that the federal courts lack jurisdiction over unnamed members of the proposed plaintiff class because there was no allegation that those class members had filed applications for benefits and had been denied. *Id.* at 764. The requirement of a decision by the agency on a claim for benefits is "central to the requisite grant of subject-matter jurisdiction." *Id.* at 764.

A year later, this Court again considered the question of federal court jurisdiction over claims for Social Security benefits where the claimants had not exhausted all of their administrative remedies by completing the four-step review process. In *Eldridge*, 424 U.S. 319, this Court held that § 405(g)'s jurisdictional requirement of a "final decision by the Secretary after a hearing" had two elements, only one of which was jurisdictional "in the sense that it cannot be 'waived,'" *id.* at 328, rejecting a challenge to jurisdiction by the Secretary of Health and Human Services. That nonwaivable element is the requirement that a "claim for benefits shall have been presented to the Secretary,"

id. at 328, which is "an essential and distinct precondition for § 405(g) jurisdiction." *Id.* at 329. This Court found that, by challenging in writing the Secretary's decision to terminate his Social Security benefits, "Eldridge has fulfilled this crucial prerequisite." *Id.* at 329. This Court further ruled that the requirement that a claimant complete the administrative process, including review by the Appeals Council, is waivable, and hence not jurisdictional, thereby allowing the federal courts to review Eldridge's case. *Id.* at 330-31.

Finally, in *City of New York*, 476 U.S. 467, this Court again rejected the Secretary's argument that the federal courts lacked jurisdiction over Social Security claimant class members who had raised their claims for benefits but failed to exhaust administrative remedies, including those whose time to request administrative or judicial review had lapsed. Id. at 478. This Court concluded that that argument was "foreclosed" by *Eldridge* and *Salfi*. *Id.* at 478.

With regard to individuals who had presented their claims for benefits to the Social Security Administration but had not pursued those claims through all levels of administrative review, this Court upheld the inclusion of those claimants in the plaintiff class. This Court quoted *Eldridge* for the proposition that those claimants, having satisfied the non-waivable, jurisdictional element of the exhaustion of remedies requirement, could seek and obtain waiver of the waivable element of the exhaustion requirement. *Id.* at 483-84. Those elements may implicate the statutes of limitations, but are not jurisdictional.

Using that analysis, Ricky Lee Smith satisfied the non-waivable, jurisdictional component of the exhaustion requirement when he applied for benefits in August 2012, again when he sought reconsideration in 2012, and yet again when he participated in an administrative hearing, which resulted in a decision on the merits by an Administrative Law Judge, in 2014.

III. The Appeals Council's wrongful dismissals cause harm to claimants.

The disruption of 9/11 in lower Manhattan was insufficient to dissuade the Social Security Administration from finding untimely and dismissing the Request for Review by Jeanette Jones. *Jones v. Astrue*, 526 F.Supp.2d 455 (S.D.N.Y. 2007). In disputing the assertion of untimeliness, Ms. Jones swore that she had hand-delivered her timely Request for Review to the agency's Office of Hearings and Appeals in Federal Plaza in Manhattan, a few days before that area was devastated by the attack. *Id.* at 460. The Request for Review must have been lost or misplaced by the Social Security Administration during the ensuing chaos, and never transmitted to the Appeals Council office for review. Jones then retained counsel, who filed another Request for Review after contacting the Appeals Council office about the status of Jones's pro se appeal and learning that the Appeals Council had never received the paperwork which Jones swore that she had filed in Manhattan. The Appeals Council dismissed that request as untimely, leading Ms. Jones to file a mandamus action in court. In response to the Social Security

Administration's motion to dismiss for lack of jurisdiction, the court concluded that it had mandamus jurisdiction, under 28 U.S.C. § 1361. In remanding the case to the Appeals Council with the directive to make findings of fact as to the truth of Jones's claim of timely filing, the court noted that, in the aftermath of the attack "it is not surprising that the Commissioner has no record of receiving the request." *Id.* at 460.[21]

Claimants with equally compelling cases who reside outside the Eleventh, Seventh, and Second Circuits have suffered seriously, and without recourse to the courts. Betty Hart's lawyer, for example, averred that he had timely sought review of Ms. Hart's case in the Appeals Council, taking special care to ensure that his clients were looked after while he underwent serious surgery that would take him away from his practice for a period of time. Despite those efforts, and despite "significant evidence that the Appeals Council overlooked his final submission," the District Court dismissed Ms. Hart's case, holding that it lacked "jurisdiction to grant Plaintiff a remedy." *Hart v. U.S. Com'r Social Sec. Admin.*, Civ. No. 09-cv-1401, 2011 WL 1211548 *4 (W.D. La., Mar. 10, 2011).

Cases like Ms. Jones's and Ms. Hart's occur with notable frequency: the Appeals Council dismisses requests for review, hastily and incorrectly deciding that

---

[21] The Appeals Council subsequently found that Jones had good cause for late filing. *Jones v. Astrue*, No. 09 Civ. 5577 (DAB) (FM), 2011 WL 3423771 *1 (S.D.N.Y., Jul. 15, 2011). And an Administrative Law Judge eventually found Jones disabled, and entitled to benefits.

the claimants filed the requests for review late and that they lacked good cause for the late filing. While there are a number of reasons why the Appeals Council makes such errors, the reasons are irrelevant if no tribunal can review the dismissals.

A. The stage at which a claim is dismissed arbitrarily determines whether the claimant may obtain review of the dismissal.

If an Administrative Law Judge dismisses a claimant's request for a hearing, the claimant has a remedy. She can request that the Administrative Law Judge vacate the dismissal order, or she can ask the Appeals Council to vacate the dismissal. *See* 20 C.F.R. §§ 404.960(a); 416.1460(a). However, Social Security regulations provide no recourse whatsoever to a claimant to challenge the Appeals Council's dismissal of her request for review. 20 C.F.R. §§ 404.972, 416.1472. The Social Security Administration provides no justification for its policy that a claimant is entitled to review when her request for a hearing has been wrongfully dismissed, but not when her request for Appeals Council review has been wrongfully dismissed.

The annual number of Administrative Law Judge dismissals which either the Administrative Law Judges or the Appeals Council vacates is unknown; the Social Security Administration does not publish those statistics. However, the collective experience of amicus curiae has been that such orders vacating dismissals happen with some frequency. And published judicial opinions in Social Security cases occasionally mention

that the Administrative Law Judge's dismissal of the claimant's request for a hearing had been vacated by the Appeals Council. *Barnes v. Astrue*, No. 08-2294, 2010 WL 1416884 at *1 (C.D. Ill., Apr. 1, 2010) (mentioning the Appeals Council's finding of good cause for late filing of a request for hearing after dismissal by an Administrative Law Judge); *Richards v. Apfel*, No. C-98-4132-CAL, 1999 WL 252477 at *3 (N.D. Cal., Apr. 14, 1999) (Appeals Council remanded for the Administrative Law Judge to reconsider whether the claimant had good cause for late filing); *Howard v. Apfel*, 17 F.Supp.2d 955, 961 (W.D. Mo. 1998) (Appeals Council remanded to Administrative Law Judge "for further consideration of whether good cause exists for the claimant's untimely filing of the request for hearing.") Cases from Courts within the Eleventh Circuit show that the Appeals Council makes similar errors, yet the majority of claimants across the country have no opportunity for review of Appeals Council dismissals, absent a Constitutional claim.

B. Appeals Council dismissals entail less rigorous review than other types of Appeals Council dispositions.

The Appeals Council issues four types of dispositions: decisions (which can be fully favorable, partially favorable, or unfavorable), remands to an Administrative Law Judge, denials of requests for review, and dismissals of requests for review. 20 C.F.R. §§ 404.967, 416.1467. If the Appeals Council issues a decision on a case or remands the claim to an Administrative Law

Judge, the decision or remand requires the concurrence of two Administrative Appeal Judges.[22] 20 C.F.R. § 422.205(b). If the two assigned Administrative Appeals Judges do not agree, a third is brought in to act as tiebreaker. However, decisions to dismiss or deny requests for review are made by only one Administrative Appeals Judge. 20 C.F.R. § 422.205(c). The Appeals Council requires that multiple Administrative Appeals Judges review a case before issuing any order which gives a claimant a favorable outcome, but most cases which result in unfavorable outcomes require only a single reviewer. In nearly all Appeals Council dispositions other than dismissals, the claimant's case is under review on the merits for a fourth time. In the case of dismissals for untimely filing, the only issues are whether the filing was timely and, if not, whether the claimant had good cause for late filing. The first and only time that issue is decided, it is disposed of by a single Administrative Appeals Judge, and, under current regulations, that decision is binding and unreviewable.

C. The Appeals Council has an enormous workload, resulting in hasty and erroneous decisions.

The Appeals Council's workload is staggering. In Fiscal Year 2017, the 57 Administrative Appeals

---

[22] Office of the Inspector General, *Request for Review Workloads at the Appeals Council*, Report Number A-12-13-13039, March 7, 2014, p. 14, https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13039.pdf.

Judges ruled on more than 160,000 cases.[23] The judges were assisted in their Herculean task by only 46 Appeals Officers, and a few hundred support personnel.[24] Individual Administrative Appeals Judges dispose of high numbers of cases each year. The median number of dispositions by an Administrative Appeals Judge in Fiscal Year 2012 was 1,283.[25] The most productive Administrative Appeals Judges issued over 3,000 dispositions. The Administrative Appeals Judges at the median disposed of approximately five cases per day, while the Administrative Appeals Judges at the high end disposed of 12 cases per day.[26] With that heavy output, Administrative Appeals Judges typically spend only 10 to 15 minutes reviewing an average case.[27] With such a high caseload and such pressure to reduce a colossal backlog, Administrative Appeals Judges are guaranteed to make mistakes. When an Administrative Appeals Judge errs on the merits of an individual's claim, the individual can seek judicial review of that mistake in the United States District Court. Yet when the Administrative Appeals Judge's mistake concerns

---

[23] Soc. Sec. Admin., *Brief History and Current Information About the Appeals Council*, https://www.ssa.gov/appeals/about_ac.html (Last visited December 15, 2018).

[24] *Id.*

[25] Office of the Inspector General, *Request for Review Workloads at the Appeals Council*, p. 10.

[26] *Id.*

[27] Petition for a Writ of Certiorari, p. 14; Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199, 257 (1990).

the claimant's compliance with filing deadlines, or having good cause for late filing, the Social Security Administration says that the claimant is out of luck – she may not obtain review of the error.

In addition to the Administrative Appeals Judges, the support staff also have enormous workloads. Historically, the Appeals Council has relied upon paper filing rather than electronic filing. When claimants submit requests for review on paper, the papers sometimes are lost or misfiled at the Appeals Council. That is precisely what Ricky Lee Smith says happened in his case: his lawyer mailed a written request for review, and the Appeals Council lost or misfiled the paperwork containing that request.

The Appeals Council now permits electronic filing of requests for review,[28] a development which will reduce the loss and misfiling of paper requests for review. Electronic filing also enables the Appeals Council to keep a record of every request for review that it receives, and the date upon which the request for review was filed.

D. Appeals Council denials on the merits are often erroneous, resulting in frequent federal court reversals.

It is impossible to know how often the cases that the Appeals Council has dismissed cases as untimely

---

[28] Soc. Sec. Admin., *Appeals Council Request for Review*, https://secure.ssa.gov/iApplNMD/oao.

would have been reversed by a federal court. However, existing data on other types of Social Security cases – those in which claimants seek review of denials on the merits – show a high rate of error.

The Social Security Administration keeps data on the number of cases denied, remanded, dismissed, and allowed (i.e., awarded benefits) at both the Appeals Council and in federal courts.[29] In Fiscal Year 2017, the Appeals Council ruled in claimants' favor in only 10% of cases that it reviewed, remanding 9% of cases and awarding benefits in 1% of the cases.[30] When disappointed claimants appealed by filing civil actions in federal court, the courts ruled in claimants' favor in 50% of cases, remanding 48% and awarding benefits in the other 2%. *Id.*[31] Federal courts reversed or remanded a total of 9,245 cases,[32] demonstrating a large number of erroneous decisions by Administrative Law

---

[29] Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, p. 206, https://www.ssa.gov/budget/FY19Files/2019CJ.pdf.

[30] *Id.*

[31] The numbers for prior years are similar. In Fiscal Year 2016, the Appeals Council remanded 13% of cases and allowed 1%, while the federal courts remanded 49% and allowed 2%. Soc. Sec. Admin., *Fiscal Year 2018 Congressional Justification*, p. 183, https://www.ssa.gov/budget/FY18Files/2018JEAC.pdf. In Fiscal Year 2015, the Appeals Council remanded 13% of cases and allowed 1%, while the federal courts remanded 45% and allowed 2%. Soc. Sec. Admin., *Fiscal Year 2017 Congressional Justification*, p. 169, https://www.ssa.gov/budget/FY17Files/2017FCJ.pdf.

[32] Soc. Sec. Admin., *Court Remands as a Percentage of New Court Cases Filed*, https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html.

Judges that the Appeals Council, by denying review, had effectively affirmed.[33]

Thus, in fully half of the cases which claimants filed, the federal judiciary concluded that the Social Security Administration had erred in denying benefits. The extremely high rate of error cannot be explained by difference in the standards of review. The Appeals Council and the federal courts apply essentially the same legal standards. The Appeals Council will review a case if the Administrative Law Judge has made an error of law or abused his or her discretion, if the Administrative Law Judge's findings or conclusions are not supported by substantial evidence, if the case has a broad policy or procedural issue that may affect the general public interest; or if the Appeals Council receives new and material evidence relating to the period at issue and there is a reasonable probability that the new evidence would change the outcome of the decision. 20 C.F.R. §§ 404.970(a), 416.1470(a). Likewise, the federal court will reverse an Administrative Law Judge's decision if it is not supported by substantial evidence, 42 U.S.C. § 405(g), is based on legal error, *Hopgood ex rel. L.G. v. Astrue*, 578 F.3d 696, 698 (7th Cir. 2009), if the Administrative Law Judge abused his

---

[33] "The Appeals Council [] struggles to fulfill its error-correction and quality-review roles. That these steps may have room for improvement is evidenced by the 45% rate at which cases are remanded back to the agency from federal courts in recent years." Administrative Conference of the United States, *Improving Consistency in Social Security Disability Adjudications*, p. 5, https://www.acus.gov/recommendation/improving-consistency-social-security-disability-adjudications#_ftnref18.

or her discretion, *Barrett v. Berryhill*, 906 F.3d 340, 345 (5th Cir. 2018), or if "there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). Thus, in half of the cases filed, the federal courts had to right the mistakes that the Appeals Council had committed or upheld. The high degree of errors on the merits suggests that the Appeals Council also makes a large number of errors in dismissing cases. Claimants must be able to seek review in the federal courts in order to correct those errors.

IV. Allowing review of Appeals Council dismissals will cause only a slight increase in federal court filings.

Social Security Administration records show that disappointed claimants filed civil actions in federal court from only 14% of "appealable" Appeals Council dispositions.[34] In Fiscal Year 2017, claimants filed 19,020 cases in United States District Court.[35]

---

[34] Appealable dispositions are denials of the request for review and unfavorable or partially favorable Appeals Council decisions on the merits. Soc. Sec. Admin., *Appeals to Court as a Percentage of Appealable AC Dispositions*, https://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html.

[35] United States Courts, *Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017*, http://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2017.pdf.

In fiscal year 2017, the Appeals Council dismissed approximately 4,000 cases, including approximately 2,500 on untimeliness grounds.[36] If claimants challenge Appeals Council dismissals with the same frequency that they challenge Appeals Council denials, there would be, at most, 560 new federal court filings each year. That number represents a miniscule percentage of the 358,563 cases filed in District Court during the 12-month period ending March 31, 2018.[37] And, as was stated above, the development of electronic filing of requests for Appeals Council review will reduce the incidence of cases in which the claimant timely files a written request for review but the Social Security Administration loses or misfiles that request, as happened in Jeanette Jones's case.

Moreover, compared to civil actions challenging the denial of Social Security benefits, civil actions challenging Appeals Council dismissals are simple cases. They only require briefing on a single question: did the Appeals Council err in dismissing the case? In order to answer this question, the court does not need to review the claimant's entire administrative record, but only the evidence related to timeliness.

Experience in the Eleventh Circuit has shown both that Social Security claimants' civil actions challenging Appeals Council dismissals have not overwhelmed

---

[36] Brief for the Respondent, p. 29.

[37] United States Courts, *Federal Judicial Caseload Statistics 2018*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018.

the District Court docket, and that the Appeals Council has erred in dismissing requests for review. *See Quarles v. Colvin*, No. 15-00572-N, 2016 WL 4250399 (S.D. Ala., Aug. 10, 2016) (remanding where evidence presented to the court demonstrated good cause for late filing); *Vargas v. Colvin*, No. 14-20133-CR, 2014 WL 6384150 (S.D. Fla., Oct. 28, 2014), report and recommendation adopted, 2014 WL 6455366 (S.D. Fla., Nov. 13, 2014) (Appeals Council abused its discretion in dismissing request for review); *Walker v. Commissioner of Social Sec.*, 2013 WL 3833199 No. 6:12-cv-1025-Orl-DAB (M.D. Fla., Jul. 23, 2013) (remanding where claimant submitted records of psychiatric treatment to the court around the time the request for review was due, which could reasonably demonstrate good cause for late filing). Had these cases been in any of the majority of Circuits, the claimants' cases would be dismissed for lack of jurisdiction, despite the erroneous Appeals Council dismissals.

This small increase in federal court cases would prevent deserving claimants from losing years of past-due benefits. The delays in Social Security claims are long. The average processing time from the date of filing of an initial application until a claimant receives a decision from an Administrative Law Judge is 817 days.[38] If the Appeals Council dismisses a claimant's request for review as untimely, and does not find good cause for late filing, the claimant loses all opportunity

---

[38] Soc. Sec. Admin., *Fiscal Year 2019 Congressional Justification*, p. 13 (This figure comes from adding processing times for initial, reconsideration, and hearing decisions).

to claim up to three years of past-due benefits, i.e., benefits which accrue during the waiting period.[39]

In addition to losing months or years of past-due benefits after a wrongful Appeals Council dismissal, some claimants lose the opportunity to ever qualify for future disability benefits. In all claims for Social Security Disability Insurance Benefits, there is a date on which the claimant's insurance coverage lapses, a "Date Last Insured," which is the date by which the claimant must establish disability in order to qualify for benefits. If the claimant's Date Last Insured expired before the Administrative Law Judge issued a decision, any new claim filed would be barred by administrative res judicata.[40] An unreviewable dismissal by the Appeals Council, no matter how wrong it is, will foreclose such a claimant from ever obtaining Social Security Disability Insurance Benefits.

---

[39] A claimant who applies for Social Security Disability Insurance Benefits can receive past-due benefits for up to a year prior to the date of filing. 20 C.F.R. § 404.621(a)(1).

[40] 20 C.F.R. § 404.957(c)(1); HALLEX I-2-4-40(J); *accord Dugan v. Sullivan*, 957 F.2d 1384 (7th Cir. 1992); *Draper v. Sullivan*, 899 F.2d 1127 (11th Cir. 1990); *Lively v. Secretary of Health and Human Services*, 820 F.2d 1391 (4th Cir. 1987); *Oberg v. Astrue*, 472 Fed. Appx. 488, 489 (9th Cir. 2012); *Aguiniga v. Colvin*, 833 F.3d 896, 900 (8th Cir. 2016).

CONCLUSION

The Court should reverse the judgment of the Sixth Circuit Court of Appeals and rule that the District Court has jurisdiction over Ricky Lee Smith's civil action.

Respectfully submitted,

CAROLYN A. KUBITSCHEK
Counsel of Record
LANSNER & KUBITSCHEK
325 Broadway, Suite 203
New York, NY 10007
(212) 349-0900
ckubitschek@lanskub.com

PAUL B. EAGLIN
P. O. Box 6033
Syracuse, NY 13217
(877) 374-4744
peaglin@eaglinlaw.com

CODY T. MARVIN
LAW OFFICES OF
BARRY A. SCHULTZ, P.C.
1601 Sherman Ave.,
Suite 500
Evanston, IL 60201
(847) 316-1282
cody@barryschultz.com